MENTALITY AND THE CRIMINAL LAW

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AND
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Justitia est constans et perpetua voluntas, jus suum cuique tribuens.

ULPIANUS.

CONTENTS

	PAGE
INTRODUCTION	1
CHAPTER	
I.—MIND	4
II.—INSANITY	13
III.—MENS REA AND INTENT	37
IV.—DRUNKENNESS	57
V.—IRRESISTIBLE IMPULSE	76
VI.—INSANITY FROM THE LEGAL POINT OF VIEW	82
VII.—SIGNIFICANCE OF THE MCNAGHTEN RULE	106
VIII.—ADVOCACY IN CASES INVOLVING MENTAL DISABILITY	115
APPENDIX—	
Some Important Statutory Enactments relating to Mental States	126
ABBREVIATIONS	154
BIBLIOGRAPHY	155
CASES REFERRED TO	157
INDEX	162

MENTALITY AND THE CRIMINAL LAW

INTRODUCTION

THE object of this small book is to present in as concise a manner as possible the salient points connected with the law of England regarding the commission of criminal offences by mentally disordered persons. A very extensive literature on this subject already exists, and it is extremely difficult for anyone to gain a serviceable knowledge of this important branch of law without the expenditure of a considerable amount of time. We have endeavoured to summarize the opinions of some of the leading authorities on the subject, and to give references to these, in the hope that our effort may enable students and practitioners of law to obtain useful information without unduly encroaching upon their time.

We have thought it well to include sections dealing with some of the more common views regarding the nature and attributes of mind, the symptoms and diagnosis of insanity, and the psychology of intent.

A careful consideration of the present position of mentally disordered persons who bring themselves into conflict with the criminal law compels one to admit that much has been done during the last century to modify any precedents which militate against their interests, and that these unfortunate individuals have little to complain of in the way they are dealt with by the legislature and by His Majesty's judges.

We would point out that although the "legal definition of insanity"* is more or less laid down by the "McNaghten† Rule" (*see* p. 83), yet nevertheless both by statute and common law the defences available for persons suffering from mental disease are considerably wider in character than those apparently embraced by this rule. And furthermore, although since 1843 in the majority of criminal cases involving the defence of insanity the judges have laid down the law in accordance with the McNaghten Rule as stated by H. Oppenheimer,[1] it is a striking fact that most of the condemned persons who have been subsequently reprieved on the grounds of insanity, have been insane from the medical, rather than from the legal, point of view.

Our task of reviewing the opinions of various authorities has been rendered much less difficult

* This phrase was used by Darling, J., in the case of James Macdonald, 1 Cr. App. R., 1908, p. 266.

† Or McNaughten.

than it would otherwise have been but for similar attempts by other writers, and of these we think it just to place first the name of Dr. Stroud, whose classic work, *Mens Rea*,[2] has been of great assistance to us, and from which we have quoted freely.

We have not hesitated to quote from other authorities on different branches of our subject, as their opinions may have more weight than our own, and be of more value to readers.

We shall see later that the McNaghten Rule refers to " disease of the mind ", and in criminal trials involving the defence of insanity mental states are frequently referred to by judges, counsel, and medical witnesses, disease of the brain being less commonly mentioned ; it was referred to by Erle, C. J., in R. *v.* Law (*see* p. 110) who used the words " morbid action of brain ". A consideration of the relationships which may exist between mind and brain is of such great importance in medico-legal cases that it seems desirable to discuss this problem in some detail before proceeding to a general discussion on insanity and an analysis of the " rule " already referred to.

CHAPTER I

MIND

As already indicated, the present work chiefly concerns those persons who have come into conflict with the criminal law, and are seeking exemption from punishment on the plea of some form of insanity.

We shall notice later that insanity is closely related to the mind, and this apparently simple word is freely used by physicians and lawyers alike.

Even in the McNaghten Rule (*see* p. 83) no reference is made to body or brain, and the gravest issue centres round the two words " disease " and " mind." Under these circumstances it behoves all advocates who may be engaged in criminal proceedings involving the plea of insanity to inquire what is the precise meaning of these two words, apparently so simple.

There is no difficulty in the case of the word " disease ". Speaking scientifically, this word signifies a disturbance in the equilibrium existing between the many and various processes in the body which produce a condition commonly referred to as " health " ; in the present connection it may be considered as synonymous with the simpler word " disorder ".

The meaning of the other word, " mind ", cannot be so readily put into simple language ; no clear and precise definition of its meaning can be given, as no human being can ever hope to understand exactly what constitutes mind. The most that one can do is to examine the different views as to the nature or structure of mind, and having done so we may be able to gain some information, however meagre, regarding its attributes.

The following quotation is from Tredgold[3] : " As to the nature of mind itself there are two chief opposing views :—

" (1) On the one hand, it is contended that mind is a spiritual something transcending matter altogether, albeit making use of matter—the central nervous system—for its manifestations.

" (2) On the other hand it is alleged that mind is no ' thing ' at all, but merely a process, that it is, in fact, simply the sum total of the ganglionic activity of the brain."

The theory of mind being a spiritual something is very old, and can with certainty be traced back to the times of Plato and Aristotle. Aristotle's famous work* *The Soul*[4] is considered to be the first text-book written on psychology, from which the following passage is taken : " We have now given an answer to the question, What is the soul ? an answer which applies to it in its full extent. It is substance in the sense which corresponds to the

* Mind is referred to in the Oxford Dictionary as the soul, as distinguished from body.

definitive formula of a thing's essence. That means that it is ' the essential whatness ' of a body of the character just assigned " (namely, organized or possessed potentially of life).

Let us here pause to emphasize the fact that whether we adopt the first or second of the above views they both postulate a connection between mind and brain, a most important relationship from a medico-legal point of view.

If we delve into the writings of later philosophers, we shall find that their views regarding mind are eminently theoretical and their speculations most interesting, but they do not help us very much to get hold of a working definition of this mysterious " something " or " nothing ". Thus Lord Haldane[5] states that " Mind is ultimate reality ", and later, " now mind is not a thing. It is not a thing that is somewhere in the brain and is worked by the nerves or works on the nerves." We shall venture later to disagree with the last part of this statement.

William McDougall[6] writes : " We may define the mind of an organism as the sum of the enduring conditions of its purposive activities."

Lloyd Morgan,[7] in an illuminating monograph, is, we think, rather more helpful in his simple method of arriving at a working definition of " mind ". He starts an inquiry into the nature of mind by considering the processes involved in seeing a candle. Here a physical object—the candle—is in physical relationship with certain mechanisms in the retina of the eye called " receptors " ; these

physical receptors are in physical and physiological relatedness via nervous conducting paths with the visual centre in the brain situated in the occipital lobe. We have thus :—

1. The retinal receptors in physical relation to the physical object—the candle.

2. The visual centre in physical and physiological relation to these receptors, and through them to the object—the candle.

If the matter ended here, there is no reason to believe that the candle would be seen by the person whose retina and visual centre are taking part in the phenomena described above. There is, however,

3. " Something " in psychical relation in some way to the visual centre, and through it to the receptors and ultimately and essentially to the candle. This " something " is what we call mind, which is concerned in taking psychical note of the candle—in plain language, seeing it.

It may be interesting to notice that it is quite easy to set up simple apparatus, e.g., a magic lantern, which will produce the image of an object upon a screen, and furthermore, by special telegraphic methods to transmit such an image over great distances ; but there appears to be no satisfactory evidence that any of the mechanical devices concerned take any such psychic note of the object as can a living organism such as man. The screen on which the image is projected appears to be quite devoid of any " awareness " of the object.

Let us compare this view with a statement from

Aristotle's work.[4] "Suppose that the eye were an animal—sight would have been its soul, for sight is the substance or essence of the eye which corresponds to the formula (i.e., which states what it is to be an eye), the eye being merely the matter of seeing; when seeing is removed the eye is no longer an eye, except in name—it is no more a real eye than the eye of a statue or of a painted figure."

We will now briefly consider some of the views regarding the origin of mind.

One of the older materialistic views was that of Cabanis, who considered that the brain secreted thought, just as the liver secretes bile.

One school considers mind to be an epiphenomenon, arising from, and thus causally related to, cerebral activity. To use the words of Watts Cunningham,[8] "According to epiphenomenalism there is a causal relation between mind and body, but it holds only in one direction; mind is an offshoot of brain activity, and so in a sense may be said to be caused by it, but mental processes cannot function as cause in relation to brain processes. Mind is an epi-phenomenon—a phenomenon, that is, which is of secondary importance only. It is produced by the brain, a halo dancing above the brain cells, as Bergson poetically puts it."

Referring to the doctrine of epiphenomenalism, William McDougall[9] writes: "Huxley and others have illustrated this doctrine by likening this stream of epiphenomenal elements to the shadows cast by the moving parts of a machine, or to the

noise fortuitously produced by them—the creaking of wheels. Perhaps a better simile would be the electrical disturbances that always are incidental to the strains and frictions of the working of a machine."

Another view regarding the origin of mind is that during the process of evolution, at one particular stage mind emerges.

The theory of emergence is well treated by Lloyd Morgan.[10] He describes an emergent as something new and unpredictable which makes its appearance in the evolutionary process. He mentions as a chemical illustration the events which occur when carbon and sulphur unite to form carbon disulphide. We could predict the molecular weight of the new compound, and this may be called a resultant; but the special properties of carbon disulphide could not be predicted, and are emergents.

According to the emergent theory mind will be something added to the brain states in the course of Nature.

Many people believe that mind comes from some external source at the moment of conception, and that it is not dependent for its origin on the activities of cerebral tissue. It can quite reasonably be surmised that cerebral activity may produce something in the nature of epiphenomena which are, as it were, held together by a mysterious something *ab extra*, a "pervading principle" (Lotze) or "medium of composition of effects", and that consciousness may thus have a two-fold origin. A somewhat similar view appears to be put forward

by McDougall :[11] "We are compelled to postulate as a necessary condition of the development of the magnetic field a medium or substance which we call the ether. Just so we are compelled to postulate an existent, an immaterial being, in which the separate neural processes produce the elementary affections which we have called psychical elements, and this we call the soul." The same author further writes : "Does the soul come into existence at the moment of conception or of birth, or does it exist before the union of those two tiny specks of protoplasm from which each mortal body and marvellous brain arise ? Does it come, as so many have believed, trailing clouds of glory or of shame ? "

It would be impossible to discuss in detail the question of the relationships which exist between brain and mind during the life history of an organism. There are two main theories :—

1. The first of these postulates that the physical processes of the brain run parallel with the psychical processes of the mind, being merely associated together in time, without reacting on each other. This is known as "psycho-physical-parallelism", and it is the view held by many eminent psychologists.

2. The second main theory is that interaction takes place between the two processes, the mental process affecting the physical process, and vice versa. This view is adopted by the interactionists, and it is probable that such a hypothesis as this is more likely to be accepted by practical scientists than by speculative philosophers.

We have already quoted Lord Haldane's opinion on this view, and our disagreement with it; we ourselves think it the most tenable of all views, and amply supported by experimental and clinical evidence.

From an advocate's point of view, the relationship between the activities of mind and brain is of fundamental importance. That there is frequently some demonstrable change in the structure of the brain in cases of mental disease will be borne out by pathologists who have examined the brains of deceased persons known to have exhibited mental symptoms during life.

Thus Bernard Hart[12] states: "Imbecility is generally correlated with an early demonstrable failure of brain development . . . acquired dementias are, like imbecility, generally correlated with marked changes in the brain."

One of the most recent text-books on mental deficiency[13] devotes one section to the subject of brain structure in relation to mind, and another section deals with the cellular changes in the brains of the mentally defective, illustrated by excellent microphotographs. An important investigation has been recently made on the chemistry of the brain in mental defectives.[14] From this research it is deduced that in the defective either the nerve-cells are immature in form or there is an excess of neuroglia present. The grey matter from the frontal lobe of 71 brains was examined, 62 being from mental defectives of various mental ages, and 9 from normal adults.

Let us refer here to the indivisibility of mind; it will be pointed out later that mind has been, as it were, divided into water-tight compartments by some clinicians; although for clinical purposes it may be convenient to make such a hypothetical division of mind into faculties, there is no evidence to show such a clear-cut separation, and the better view is that mind is continuous.

As stated by Lloyd Morgan,[7] according to the interactionists "mind is non-spatial, unextended, and indivisible, as contrasted with the spatial order of the world of things and physical objects." Oppenheimer[1] also writes: "mind is a living harmonious whole, each part of which receives support from every other, and is bound up with all others by ties of the most intimate solidarity. It cannot therefore be admitted that any one of the divers faculties can receive a hurt, without the equilibrium of the whole system being disturbed."

It may be helpful to conclude this discussion by laying stress on the fact that all theories regarding the nature and origin of mind must to a great extent be purely speculative. Nevertheless cerebral and mental processes are closely related to each other, and in all probability interact. Furthermore, mind is one homogeneous whole, and any defect in one function of the mind cannot exist without a possible influence on other functions.

The methods of diagnosing mental disorder are discussed in Chapter II.

CHAPTER II

INSANITY

It seems desirable to begin the discussion in this section with a consideration of some of the outstanding features of insanity, so that an advocate may possess some working knowledge of what constitutes this state or condition; otherwise it must of necessity be a matter of extreme difficulty to examine or cross-examine a medical witness.

As in law, so in medicine, there is no precise and exact definition of the meaning of the word "insanity", and although in many cases it is quite easy for an expert to pronounce a person insane, in many other cases it is by no means easy to do so. Furthermore, within wide limits insanity is no bar to a person's liberty, and the law only interferes under certain conditions to take away an individual's freedom to behave as he pleases.

There have been many discussions regarding the respective views held by lawyers and physicians as to what symptoms of insanity should exempt a person from criminal responsibility. As will be seen later, the McNaghten Rule defines those symptoms of insanity which of themselves, confer such exemption. In the case of James Macdonald (1 Cr. App. R., 1908) Mr. Justice Darling referred

to " the legal definition of insanity ". In the case of John William Smith (5 Cr. App. R., 1910) an appeal case involving the defence of insanity, Mr. Justice Darling said, " The law on this subject is perfectly well known ", and proceeded to quote the McNaghten Rule.

These and many other cases make it quite clear that a person may exhibit symptoms of insanity which do not conform with the legal requirements for exemption from criminal responsibility. It is probable that the great majority of the medical profession consider that any symptom of insanity should justify exemption from such responsibility.

It is generally agreed that insanity is a disease or disorder of the mind, but it is of the utmost importance to realize that all types of mental disorder are not insanity ; many authorities consider that when a person knows that he or she is suffering from a disordered mind, the fact of this knowledge precludes a diagnosis of insanity. That this is so appears to be recognized by a provision in the Mental Treatment Act 1930 (20 & 21, Geo. 5, c. 23). Sections 1–4 make it possible for persons suffering from mental disorder voluntarily to subject themselves to treatment in a mental institution.

Charles Mercier[15] divides mind into gradually ascending levels or faculties and considers that insanity exists only in those persons in whom there is disorder of the higher levels. In another work[16] he gives the following very simple illustration of sane disorder of mind : " Giddiness may be

taken as a very familiar example of very crude disorder of mind—of disorder of mind on the lowest level; and this disorder of mind has its expression in an equivalent disorder of conduct, which also is crude and on the lowest level of conduct. It finds expression in the reeling, and staggering, and clutching at support that we know accompanies giddiness. The maintenance of equilibrium is a mode of conduct; and the disturbance of this maintenance that occurs in giddiness is a disorder of conduct. . . . The clutchings at support are manifestations of disorder on a low level, but of order on a higher level.

"They are in themselves abnormal, the expressions of an abnormal state of mind, viz., giddiness; but they express also the compensation that is designed by a higher level of mind, to correct the disorder of the lower level.

"The perception of the outside world as rotating, is a disorder of mind; and the reeling and swaying are conduct, the result of this disorder, but the clutching at supports is normal conduct, prompted by a higher level of mind that is free from disorder, and acts to counteract the effect of the disorder that exists lower down."

The above quotation should help us to grasp a most fundamental fact closely connected with the problem of diagnosing insanity and referred to later; that mental disease is invariably associated with some degree of change of conduct. The student of insanity must also be a student of

conduct, for one of the most obvious and satisfactory methods of gaining insight into the mental processes of an individual is to observe carefully the conduct of that individual.

When disorder of the higher levels of mind exists, one of the main results is that the subjects of the disorder seem quite unable to adapt themselves to the ordinary circumstances of life—they are out of equilibrium with their fellow-men—and this lack of adaptability is one of the signs of insanity; it is not a sure sign, as many men who are considered to be sane, and even brilliant, cannot adapt themselves to their surroundings. When this lack of adaptability renders a man dangerous to himself or others he is considered to be sufficiently insane to be restrained at the instance of the law. A person's attitude to his fellow-men must always be most carefully considered in every case of suspected insanity, and can often be ascertained by judiciously questioning him, his relations, and friends.

The question, " Sane or insane ? " largely resolves itself into a critical comparison of the personal history of an individual with that of an individual in the same circumstances of life who is considered to be sane. Such a method must of necessity be somewhat unsatisfactory as there is no fixed standard for sane people to comply with. It must also be remembered that the conduct of many social and religious reformers does not conform with the conduct of their fellow-men. They have, however, in many cases indicated that they consider

the conduct of so-called normal people to be ethically wrong, and have endeavoured to set up a higher general standard of conduct.

CAUSES OF INSANITY

In this section some of the factors which may be concerned with the incidence of insanity will be discussed briefly. The reason for such a discussion is that a knowledge of some of the possible causes of insane mental disorder may assist an advocate to determine with the aid of a medical witness whether a particular person is suffering from such disorder.

1. **Heredity.**—In connection with this possible cause of insanity it should be carefully noted that :—

a. The offspring of mentally afflicted persons are themselves frequently the subject of mental disease, although this is not invariably the case.

b. Persons who have ascendants other than parents who have suffered from insane mental disorder are also more likely to develop such disorder themselves than those persons whose family tree is free from such evidence of mental instability.

2. **Physiological Strain at Various Periods of Life.**—A second common cause of insanity appears to be the extra strain on the individual which is associated with different periods of life.

It is beyond doubt that the majority of human beings pass through a varied number of years between birth and death without exhibiting any signs or symptoms of insane mental disorder.

Most authorities on the subject are agreed that those persons who escape from such disorder possess a more stable nervous system than those who exhibit, even for a short time, symptoms of insanity. There are, broadly speaking, three periods in the life history of an individual when, owing to readjustment of the bodily processes, an enhanced physiological strain is brought about in the endeavour to adjust self to circumstances. The first period coincides with teething, the second with adolescence, and the third with that phase known as the climacteric, or change of life.

Teething.—Most observant people are well acquainted with the behaviour of teething infants; they exhibit symptoms of slight nervous disorder such as increased irritability or peevishness, and convulsions are not uncommon; but at this stage the mind is not sufficiently developed for a casual or untrained observer to notice anything abnormal, and quite obviously there may be nothing abnormal to observe.

Adolescence.—The change from childhood to adolescence, accompanied by development of the sexual functions, is sometimes associated with marked signs of insanity, fortunately in the majority of such cases only of temporary duration.

Climacteric.—The third or climacteric period may be associated with nervous disorders in both sexes, but in males such disorders appear to be less frequent than in females. A recent article[17] on the

disorders of the male climacteric is, however, of great medico-legal importance, as may be judged from the following quotations from it :—

"The critical age is often associated with a sudden flare-up in the dying embers of desire. Novelists have made good copy out of the dangerous age in woman. In man the corresponding phenomenon has, because in general it was less marked, received little attention. As a rule, it is productive of nothing more sensational than a conflict between desire and the ability to achieve—a conflict that may in some cases be the starting point of a neurosis. But sometimes this increase of sexual urge has graver consequences, especially when it takes a somewhat abnormal form. The most frequent of these abnormal forms is what has been termed the 'gerocomic tendency'—that is, the desire of an elderly man for very young girls."

Dr. Kenneth Walker considers that the subjects of such abnormal disorder should be treated as invalids, and not punished as criminals, should they come into conflict with the law.

In females this period, usually referred to as the menopause, is in a considerable proportion of individuals associated with well-marked nervous symptoms, often requiring careful and prolonged treatment. At this time many women are mentally unstable, and may be a source of great anxiety to their friends. It sometimes happens that the nervous symptoms are accompanied or followed by definite signs of insanity, and some of the

unfortunate sufferers commit suicide, or are guilty of other breaches of the law.

In 1926 an investigation was made by one of us[18] with reference to the symptoms complained of by women at the climacteric period. In 100 cases attending at the Bristol Children's and Women's Hospital, and diagnosed as suffering from the effects of the menopause, 19 complained of abnormal sensations in the head. These sensations were variously described as "headache", "pressure" or "clamping", "pains in the head", "something coming in the head", "confused feeling", etc. Alimentary toxæmia resulting from constipation, coupled with raised blood-pressure probably accounts for some of these symptoms.

3. **Parturition.**—There is at least one other physiological process which may occur during the life history of females, namely childbirth, when, owing to increased strain on the various organs concerned, insanity may supervene. This is recognized to some extent by the Infanticide Act 1922, which removes the extreme sanction of the law under certain conditions associated with childbirth.

4. **Toxic Insanity.**—There are at least two types of toxic insanity—namely, the insanity caused by poisons administered to, or entering the body from without, and the insanity brought about by poisonous substances known as toxins which are produced within the body.

The number of toxic substances which may enter the body from without is legion; probably the

most important one is alcohol, and this is discussed under drunkenness, or alcoholic insanity.

A type of acute insanity resembling alcoholic intoxication is sometimes observed during the course of acute febrile diseases, the toxic substances being derived from invading bacteria. This matter is more fully dealt with under drunkenness and insanities of short duration. Several forms of chronic insanity are caused by the invading micro-organism which is the causative factor in syphilis.

It is highly probable that many cases of insanity owe their origin to a special class of poisons produced within the body and known as endogenous toxins. Such toxins may be abnormal products of cell activity, or they may be normal products of metabolism which are in most persons rendered innocuous by the antitoxic action of certain glands known as endocrine glands, which have for some reason or other failed to carry out their duty of detoxication. A good illustration of a disease due to defective action of an endocrine gland is that condition known as myxœdema, which we now recognize owes its symptoms to underactivity of the thyroid gland. In this condition, in addition to other troubles, the memory may become defective, the patients irritable, and in a small proportion of cases there are delusions and hallucinations leading to a state of dementia.[19] In the later stages of cardiac failure mental symptoms are not uncommon, possibly partly due to lack of nutrition of the cerebral tissues, and partly to accumulation

of toxins in the system. The liver being a detoxicating organ, hepatic lesions may be associated with mental symptoms.

5. **Insanity due to Special Stress of Circumstances.**—A certain proportion of cases of insanity are brought about by various events which produce a severe strain on the nervous system. During the Great War, the hardships and dangers of modern warfare caused a considerable number of persons to become insane.

The better opinion appears to be that the unfortunate individuals who become afflicted in this way possess a nervous system of less than average stability, since their fellows frequently go through periods of greater strain with no ill result.

6. **Insanity Initiated by Trauma.**—Traumatic or mechanical injury to the brain is definitely responsible for many cases of insanity. During the war a considerable number of persons suffered from mental disorder brought about by injuries to the cranium or brain case, or to the brain itself, and in a certain proportion of cases the mental symptoms were alleviated by appropriate surgical treatment. The same happenings may occur in civil life, where a disturbance of the mental faculties may be brought about by accidental injuries affecting the brain. A case of this nature seen by one of us illustrates this fact very well: An adult male had been kicked on the head by a horse. He became mentally confused, and finally succumbed; at the necropsy a gross cerebral lesion was revealed.

One of the outstanding characteristics of injuries to the brain is the uncertainty of the sequence; death may be instantaneous or delayed for considerable periods, and an apparently serious injury may lead to less tragic results than one which at first gives cause for less anxiety.

7. **Effect of Variations in Blood-pressure on Mental States.**—There is a considerable amount of misapprehension on the part of many people regarding the meaning of the word "blood-pressure," and one frequently hears it stated that an individual is suffering from this condition. Blood-pressure is not a disease, but a normal physiological phenomenon which can be demonstrated in various ways.

Anyone who has been unfortunate enough to cut a small artery, or who has been present when someone else has done so, cannot fail to have observed that the blood liberated from the cut vessel spurted out a considerable distance. One of the earliest scientific demonstrations of this phenomenon was made by the Reverend Stephen Hales, minister of Teddington, who in 1722 by a simple device inserted a glass tube into the femoral artery of a horse, the blood rising to a height of eight feet in the tube. This method of measuring blood-pressure has been very considerably modified since the time of Stephen Hales, and it can now be readily determined by simple instruments without resorting to the heroic method of severing an artery.

It should be noted that the blood is kept circulating in the arterial and venous systems by means of the pumping action of the heart, the elasticity of the blood-vessels, and the resistance offered by the peripheral capillaries and venules. This simple fact is of great importance, since variations in blood-pressure may be brought about in at least three ways: (1) By variations in the force exerted by the heart; (2) By variations in the elasticity of the blood-vessels; (3) By variations in the peripheral resistance.

Before proceeding further it is desirable to emphasize a most important fact, or series of facts, in connection with blood-pressure.

It would be out of place in such a work as this to go into any great detail regarding variations in blood-pressure at different periods of life, or in association with certain diseases; let it suffice to say that this phenomenon is usually expressed in millimetres of mercury. There is no fixed blood-pressure for any age or sex, but in healthy young adults it is usually equal to about 120 millimetres, gradually rising till the incidence of middle life.

There is some difference of opinion as to the figures which should be taken to indicate that the blood-pressure is above normal, but certainly anything over 160 millimetres in an adult should be regarded with suspicion.

An approximate figure for normal blood-pressure has been stated to be, between twenty and sixty

years of age, 100 millimetres plus the age of the person in years; thus a person aged fifty years would, according to this rule, have a pressure of 150 millimetres. It is probable that the pressure so calculated is a little on the high side after forty or forty-five years of age.

The next point to notice is that as far as can be ascertained with any degree of certainty, persons exhibiting increased blood-pressure frequently experience no unpleasant sensations and have no untoward symptoms, but only become aware of their condition after they have been subjected to a routine medical examination for some special purpose such as obtaining a policy of life insurance.

From an advocate's point of view the cause of increased blood-pressure may be a matter of considerable importance for reasons which will be dealt with elsewhere. It is beyond dispute that the condition of a person's blood-vessels bears a distinct relationship to his or her life history; there may have been an inherited tendency to arterial degeneration, and numerous instances have been recorded where a young person has possessed congenitally diseased blood-vessels.

A very common cause of arterial degeneration or arteriosclerosis is the absorption of toxic substances, either willingly, as in the case of alcohol, or unwillingly, as in the case of toxins derived from invading micro-organisms. Probably the most pathetic cause

of arterial degeneration accompanied by an elevated blood-pressure is prolonged hard work; this cause is recognized by medical writers of great repute. Thus Osler[19] under the heading arteriosclerosis, writes: "Among other causes . . . stress and strain. There are men in the fifth decade who have not had syphilis, or gout, who have eaten and drunk with discretion, and in whom none of the ordinary factors are present, men in whom the arteriosclerosis seems to come on as a direct result of a high-pressure life."

In the same text-book it is pointed out that overwork of the muscles by increasing the peripheral resistance raises the blood-pressure, and, further, that the subjects of arteriosclerosis are liable to have convulsions or temporary palsies, following which the individual concerned may be in a dazed condition and quite unlike his normal self. Such people may do things of which they are subsequently unaware.

At a later stage there may be a change in the individual's disposition, and persons who have been affectionate and moral may become at times brutal and lecherous. When one hears of hitherto respectable old men interfering with females and making indecent suggestions to them, the state of their arteries should be considered before condemning them as immoral.

The physiological cause of these abnormal mental states appears to be some interference with the blood-supply to the brain. This interference may

be brought about by partial occlusion or obliteration of the blood-vessels by a condition known as "arteritis obliterans", or, more especially when the mental changes are less permanent, by spasm of the artery concerned, causing a temporary closing of the lumen.*

It must be noticed here that two factors may be involved in producing a state of affairs which brings many unfortunate people into conflict with the law.

In the first place, interference with the blood-supply to the brain by reason of permanently damaged arteries tends of itself to produce changes in the mentality of the sufferers, who are less able to use the faculty of reason. If a further and almost complete deprivation of blood to certain areas of the brain is brought about by arterial spasm, the individual goes into a state of mental confusion, and is liable to do very strange things. It is not uncommon to hear of a hitherto affectionate parent making ferocious attacks on those who are normally the objects of his care and attention. We remember the case of a blacksmith who was suffering from high blood-pressure, and developed foolish suspicions with regard to his wife, whom he attacked with a hammer and severely wounded. He had hitherto been an excellent husband, a devoted parent, and a social worker.

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* A recently published article contains references to arterial spasm.[20]

INVESTIGATION OF MENTAL STATES

What methods have we of investigating the mental states of individuals other than ourselves? Are any of the methods in use absolutely reliable, and, if not, are some of them more reliable than others? The answers to these questions may be of great interest to advocates who are seeking to establish the presence or absence of insane mental disorder in accused persons.

It is fairly obvious that the mind cannot be directly examined in the same way that a physician examines the chest or abdomen. In the first place, it is very desirable that at a conference between counsel and medical witnesses the following matters should be considered :—

1. The medical history of accused person's near relatives, especially that of parents and grand-parents.

2. The medical history of accused person should be carefully gone into, especially with reference to any illnesses associated with mental or nervous symptoms. The question of any injury to the head should also be considered.

3. It should be ascertained if certain symptoms commonly associated with insane mental disorder have been experienced by accused—e.g., delusions and hallucinations.*

4. A careful inquiry should be made as to any change in the conduct of the accused which may have taken place; as previously stated, the most

* Delusions are false beliefs. Hallucinations are disorders of perception.

definite sign of a disordered mind is disordered conduct. It is appropriate to refer here to an important physiological law—"the law of dissolution"—which postulates that the part of the brain which is developed last is most liable to be affected first by pathological processes and certain toxic substances. Those parts of the brain which appear to be associated with the control of ethical conduct are developed at a later stage than the centres controlling respiration and circulation. An early sign of insanity is sometimes the development of slovenly habits in a person who has hitherto been meticulously careful as to his dress and personal cleanliness.

5. Physical stigmata should not be overlooked, but their relation to the state of the mind must be considered with the greatest caution.

It must be emphasized that the presence of such stigmata does not of itself make a person insane, but it may help to build up a syndrome of symptoms characteristic of insanity. The following stigmata are worthy of special notice:—

a. Various malformations of the ear and lack of symmetry between the two ears.

b. Abnormal configuration of the hard palate—a Gothic arched palate is frequently associated with low mentality.

c. The eyes of people of low mentality are frequently set farther apart or closer together than is normally the case. They are also sometimes set at abnormal angles.

d. The shape and size of the skull may also be of great importance, but here again cranial measurements cannot be more than indications of varied mental development.

It is desirable that advocates should realize the importance of a very thorough clinical examination of an accused person, especially of the nervous system. If we accept the view that there is some connection between mental processes and the processes which take place in certain parts of the central nervous system, it seems obvious that a careful examination of this system may give us some evidence of the mental state of the individual concerned, and may confirm the inference made from the observation of disordered conduct that mental disorder also exists.

It is fortunate that when we make a scientific examination of the nervous system it is possible to obtain information as to the condition of this system which is quite independent of the volition of the person examined. Whereas people may wilfully modify their conduct to serve their own ends, they are unable to influence certain physical signs which may be observed by a physician.

Not only can one make use of knowledge concerning the various organs of sense, and the nervous conducting paths in the brain and spinal cord, but it is also possible to examine the blood and urine by chemical methods, and evidence may be found of the presence of abnormal constituents in these fluids, which by their presence indicate the existence

of some constitutional disease which may affect the brain.

In the normal healthy individual it is possible to demonstrate certain phenomena called " reflexes " which depend upon the integrity of different parts of the central nervous system. A common example of this is the pupil reflex, or the reaction of the pupil of the eye to light and accommodation. If a beam of light be thrown on to a normal person's eye there is a rapid contraction of the pupil, followed by an equally rapid return to the normal size when the source of light is removed. Conversely, if a person's eyes are shaded by partially covering them with the hand, a brisk dilatation occurs, followed by a return to normal size when the hand is removed. The reaction of the pupil to accommodation can also be observed by asking a person to look first at a near, then at a distant object, and carefully watching for variations in the size of the pupil. These reactions of the pupil depend upon the healthy condition of the nervous arcs which control its dimensions. The pupil reflexes are modified by certain toxic substances—for example, alcohol, and the poison derived from the micro-organism causing syphilis. In the latter disease there is an actual degeneration in parts of the nervous arc and not a temporary disturbance of function as in acute alcoholic intoxication.

The tendon reflexes, of which the best known is the knee-jerk, are also modified in various ways by a variety of diseases affecting the central

nervous system; for example, in the majority of advanced cases of locomotor ataxia, a syphilitic disease, the knee-jerk is absent, and there is no response when the tendon of the quadriceps extensor muscle, situated just below the knee-cap, is stimulated by gently tapping it *secundum artem* with the fingers or a percussion hammer. Similar tendon reflexes may be elicited by testing the muscles of the arm, and, as in the case of the knee-jerks, these may be modified by various pathological conditions.

In certain gross lesions of the brain an examination of the back of the eye by means of an ophthalmoscope may give most valuable information. Thus in a great majority of cerebral tumours, and in many cases of abscess of the brain, a condition known as optic neuritis occurs which produces characteristic changes in the optic disc which are of great diagnostic importance, and may account for any observed symptoms of mental disorder—such as mental confusion.

INSANITY OF SHORT DURATION

If we consider the remarks made by judges on various occasions we cannot fail to be struck by the great difference in the views they have expressed regarding temporary insanity.

In the early part of last century during the trials of Burrows (1823) and Rennie (1825) (1 Lewin, pp. 75, 76) Mr. Justice Holroyd refused to regard

drunkenness as an excuse for crime unless it had induced a lasting condition of insanity.

In R. *v.* Davis (1881) (14 Cox 563) Mr. Justice Stephen considered that temporary madness was a defence.

In R. *v.* Baines (*Times*, 1886, Jan. 25) Mr. Justice Day laid it down that whether insanity was permanent or temporary it equally excused acts done, and that it was immaterial whether the insanity was caused by the person himself, or by the vices of his ancestors.

In R. *v.* Harding (1908) (1 Cr. App. R. at p. 219) Mr. Justice Darling is reported as saying " temporary insanity is not known to English law ".

In Director of Public Prosecutions *v.* Beard (1920) (14 Cr. App. R., H. L.) the Lord Chancellor quoted the remarks made by Mr. Justice Stephen in R. *v.* Davis (*supra*), and agreed with him that insanity, even though temporary, furnishes an answer to a criminal charge.

In view of the fact that one of the criteria in the McNaghten Rule is the question as to the mental condition of the accused person at the time of the act, it is necessary to consider the question of temporary insanity in rather more detail.

It has been recognized by alienists for a long time that the duration of insanity may vary from a minute or so to a life-time, and this, as stated in the chapter on drunkenness, is strongly maintained by the late Dr. Charles Mercier. It would be grossly unjust to punish a person for homicide

committed whilst under the influence of a drug negligently administered, and it would be equally unjust to subject an individual to punishment because he had committed a breach of the law during a phase of an acute infection such as pneumonia or typhoid fever when cerebral symptoms may be prominent features of the disease. It is unfortunate that many laymen fail to realize that being delirious or in a state of delirium means being temporarily insane! In such cases the unfortunate patient could not reasonably be held to exhibit the slightest degree of *mens rea*, and there should be no difficulty in proving conclusively the absence of a capacity to form the necessary intent, constructive or otherwise, required to constitute a crime.

It should be noticed in connection with such temporary mental disorder as above referred to that homicide is seldom committed. There are several factors which tend to prevent the commission of this crime. The chief of these is that the patient is usually in a feeble and debilitated condition and is furthermore generally so carefully looked after that crimes of violence are almost impossible. It is, however, unfortunately the case that on rare occasions the patients evade the vigilance of their attendants and succeed in destroying their own lives. The question of acute alcoholic "dementia affectata" is discussed under drunkenness, but it is again here urged that this is undoubtedly a definite form of temporary insanity.

It is sometimes brought out in the course of a criminal trial that a defendant has suffered or suffers from one or other of the forms of epilepsy, a nervous disease in which the subjects are liable to periods of mental confusion generally following a fit. Such persons are liable to do things during these periods of which they are subsequently unaware.

The question of epilepsy was dealt with in the case of Henry Perry (14 Cr. App. R., 1919, pp. 48–56). The appellant was sentenced to death at the Central Criminal Court in May, 1919. At the hearing of the appeal medical witnesses were allowed to be called to prove that appellant was an epileptic. The Lord Chief Justice said: "The crux of the whole question is whether this man was suffering from epilepsy at the time he committed the crime. Otherwise it would be a dangerous doctrine if a man could say 'I once had an epileptic fit, and everything that happens hereafter must be put down to that'. . . . All the facts of this case are consistent with the acts of a sane man of a criminal and brutal disposition. The Court has had further evidence, especially in the prison records, of his having had attacks of epilepsy. But to establish that is only one step; it must be shown that the man was suffering from an epileptic seizure at the time when he committed the murder; and that has not been proved. . . . The jury came to the conclusion that they were not satisfied with the evidence of insanity. . . ." See also evidence

of medical officer in case of Michael Collins (6 Cr., App. R., 1911).

Before proceeding to consider insanity from the legal point of view it appears desirable to examine the fundamental principles on which mental disorder may excuse or modify the sanctions usually associated with criminal acts. The next chapter will therefore deal with the doctrine of *mens rea*, and the subjects intent, constructive intent, drunkenness, and irresistible impulse.

CHAPTER III

MENS REA

CRIMINAL responsibility is so closely associated with mental states that it seems appropriate to commence a discussion on the subject of intent with some account of the doctrine of *mens rea.* This doctrine has been so fully dealt with by Stroud in his valuable work to which we have previously referred that it is only necessary for us to devote a short space to this interesting subject.

During many centuries judges have referred to the connection between *mens rea* and criminality, and a few of these judicial dicta may be quoted here.

In Fowler *v.* Paget (1798) (7 D. & E. 1798) per Kenyon, L. J.—"It is a principle of natural justice and of our law that *actus non facit reum, nisi mens sit rea.*"

In R. *v.* Prince (L. R. 2 C.C.R., p. 154, 1875) per Brett, J.—"Upon all the cases there can be no conviction for crime in England in the absence of a criminal mind, or *mens rea.*"

In R. *v.* Tolson (23 Q.B.D.L.R., 1889, p. 168), per Cave, J.—"At common law a reasonable belief in the existence of circumstances, which, if true, would make the act for which the prisoner is

indicted an innocent act has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim *actus non facit reum, nisi mens sit rea.*"

The same learned judge said in Chisholm *v.* Doulton (1889) (22 Q.B.D. 736): "It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind. Sometimes it is negligence, sometimes malice, sometimes guilty knowledge, but as a general rule there must be something of that kind which is designated by the expression *mens rea.*"

This definition of *mens rea* seems far more satisfactory than the definition "criminal mind" used by Mr. Justice Brett, since a careful consideration of R. *v.* Prince leads one to suppose that we may have a moral *mens rea*, a civil *mens rea*, and a criminal *mens rea.*

It must also be remembered that it is not only illegal but also unethical to break the laws of one's country, and that therefore various degrees of moral *mens rea* are exhibited by those persons who are guilty of criminal offences, quite apart from the criminal *mens rea* associated with such offences. This point is further considered under ADVOCACY.

The absence of a *mens rea* in very young children, and in lunatics coming within the McNaghten Rule, directly or indirectly, is the ground for their freedom from the extreme consequences of any felonious acts which they perpetrate. The highest degree of

criminal *mens rea* is exhibited by persons guilty of treason or who commit murder with malice and forethought, and one of the lowest degrees is associated with certain minor felonies.

Again, in the commission of various specific statutory and common law felonies the offender may exhibit all degrees of criminal *mens rea*. Thus, in the case of murder, he may exhibit the highest degree, as pointed out above, or a much lower degree, as when he is only guilty of constructive murder. This is of great theoretical and practical importance, since an accused person who has engaged in an act which involves a certain kind or degree of *mens rea*, may be convicted of a crime involving a much higher kind or degree of guilty mind.

This point was well brought out in R. *v.* Prince (*see* p. 38), where a man was convicted of taking a young girl from the custody of her parents, although he had reason to believe that she was older than her actual age, and at the most he exhibited only a civil *mens rea*.

A common crime, that of bigamy, may also be associated with various degrees of *mens rea*, as in some cases it amounts to rape, whereas in other cases it is nothing more than an ethical offence, or arises from ignorance. It is the practice of some judges to inquire if sexual relationship has occurred before a bigamous marriage, and when this is the case to award a lesser punishment than in cases in which no such relationship has preceded the bigamy.

If we consider the many instances where at common law or by express statutory enactment a jury may convict of a lesser crime than that set down in the indictment, we cannot fail to realize that the legislature recognizes different degrees of criminal *mens rea* or criminal intentionality.

INTENT

Let us now examine the significance of the word " intent ", which is so frequently used by legislators and lawyers that it is necessary to consider its meaning in some detail. A few definitions of the word may be referred to.*

" Intent will be found to resolve itself into two things: foresight that certain consequences will follow from an act, and the wish for those consequences working as a motive which induces the act."

" Intention is the purpose or design with which an act is done. It is the foreknowledge of the act coupled with the desire of it, such foreknowledge and desire being the cause of the act, inasmuch as they fulfil themselves through the operation of the will. An act is intentional if, and in so far as, it exists in idea before it exists in fact, the idea realizing itself in the fact because of the desire by which it is accomplished."[21]

It is necessary to distinguish very carefully between " foreknowledge " and " intent "; this

* In ordinary language the word " intent " must be taken as synonymous with " intention ".

point is fully discussed in text-books of jurisprudence, but must be briefly considered here. It is obvious that any person may perform some particular act and be well aware of the consequences of that act, and yet have no desire for such consequences to result, and moreover may be extremely sorry that his act will of necessity be followed by these consequences. Thus a dental surgeon, who under force of circumstances, extracts a carious tooth from a person without an anæsthetic knows quite well that the extraction will be associated with pain, yet he does not desire this pain to result from his act.

If we wish to obtain some information concerning the scientific aspect of intent we must seek the assistance of those who have made a special study of the mind, as intent results from mental activity.

Mercier,[16] who for clinical purposes divides mind into faculties, writes: "It is the function of this highest faculty to determine questions of policy . . . what to do, and how to do it. The highest faculty of mind is the ability to choose."

Lloyd Morgan[10] writes: "Under what I here call emergent evolution stress is laid on the incoming of the new. Salient examples are afforded in the advent of mind, and in the advent of reflective thought."

It is thus made clear that if we hold the views of this well-known psychologist it is possible to conceive a mind which is incapable of reflective thought,

e.g., the mind of a child of tender years or of an insane person.

We are greatly indebted to Professor Lloyd Morgan for his kind permission to quote from some correspondence which has passed between us with reference to specific intent. He writes: "With regard to 'specific intent' I should say that *if* specific, i.e., with a clear-cut end in view, then highly reflective mental process is involved." Writing later he says: "I feel pretty sure that you are on safe ground so long as you make it clear that what is meant by specific intent is something quite definitely in mind as the objective of a definite course of conduct to be carried out with that end in view. This excludes so-called 'subconscious wishes' and bogies of that ilk."

Having discussed the psychological meaning of the word "intent" it is necessary to consider the significance of this word in criminal law. Stroud[2] makes the statement: "Full intention is usually signified in English law by the word intent." He supports this view of the meaning of the word by referring to R. *v.* Nattras (1882) (15 Cox, 73). In this case the prisoner was indicted under 24 & 25 Vict. c. 97, s. 7, for feloniously, unlawfully, and maliciously attempting to set fire to a dwelling house by setting fire to certain things in the dwelling house.

Mr. Justice Hawkins ruled "that the mere setting fire to an article in the house which might have set fire to the house itself, will not do. There must be an intent, or something from which we can infer an

intent, to injure the house. A mere intent to injure the owner by destroying goods of his in the house is insufficient." The learned judge later said : " If a person maliciously, with intent to injure another by merely burning his goods, sets fire to such goods in his house, that does not in my opinion amount to a felony, even though the house catches fire. Unless indeed the person setting fire to the goods knew that by so doing he would probably cause the house also to take fire (in which latter case there would be strong evidence that he intended to bring about this probable consequence, viz. : the burning of the house)."

If we examine the case of a man who, after an apparently uncalled for and unexpected assault upon an individual who has hitherto been the object of his affection, later finds himself indicted for " malicious and unlawful wounding with intent to inflict grievous bodily harm ", we may find the following facts brought out in evidence :—

1. His general conduct has been gradually undergoing a change, and he has become suspicious of his best friends.

2. A medical examination has probably revealed some change in his physical state, such as an increase in blood-pressure, associated with cardio-vascular degeneration—that is, pathological changes in his heart and blood-vessels.

Such an individual, being liable to temporary attacks of mental confusion, may at any time commit an assault upon persons near him, with or

without provocation, having become morose by brooding over slight or imaginary grievances. Psychologically it is quite impossible for such a man, at such a time, to engage in reflective thought; he acts on the impulse of the moment because he is enraged, and although he may know that he is inflicting some pain, it is highly improbable that he has a clear-cut intention to inflict grievous bodily harm.

The legislature undoubtedly recognizes such a state of things as here described, and makes provision accordingly, it being lawful in such a case for the jury to find a verdict of unlawful and malicious wounding. (Prevention of Offences Act 1851, 14 & 15 Vict. c. 19, s. 5.) Furthermore, on an indictment for unlawful and malicious wounding a prisoner may be found guilty of common assault (R. *v.* Taylor, L. R., 1 C.C.R., p. 194, 1869). It seems obvious that a person may assault another person with the definite intention to inflict serious harm, or because the person assaulted has annoyed the person who assaults, or perhaps more usually because the person assaulting is in a violent passion and does not fully realize what he is doing.

There have been a number of cases in which judges have used the words "specific intention", and we venture to think that this is a more satisfactory expression in cases where it is obvious that a definite intention must be associated with an unlawful act in order to constitute the offence charged.

In R. *v.* Monkhouse (4 Cox, 55, 1849) where the defendant was charged with shooting with intent to murder, and drunkenness was pleaded, Mr. Justice Coleridge said : " Drunkenness is ordinarily neither a defence nor excuse for crime . . . unless the intoxication was such as to prevent his restraining himself from committing the act in question or to take away from him the power of forming any specific intention."

In an American case, The State *v.* Bell, Supreme Court of Iowa, 1870 (K.S.C., p. 55), Wright, J., said : " The drunkenness is a proper circumstance to be weighed by the jury in determining whether there existed the intent to commit the specific felony charged."

In Director of Public Prosecutions *v.* Beard—15 Cr. App. R. (1920) House of Lords—the Lord Chancellor after referring to cases involving intent, said (p. 192) : " Notwithstanding the difference in the language used, I come to the conclusion that (except in cases where insanity is pleaded) these decisions establish that where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime . . ."

There can be little doubt that the word intent must be taken to mean specific intention when it is inserted in statutes and indictments.

Proof and Rebuttal of Intent

Proof of Intention.—It has been so frequently stated by judges that a man's acts are the best index to his intention that it has become a rule of common law that every man must be presumed to know and to intend the natural and probable consequences of his unlawful acts. It is obvious that intention is not capable of positive proof, and can only be implied from overt acts.

One of the early cases in which this doctrine was propounded is that of R. *v.* Farrington 1811 (R. & R. 207). In this case the defendant was indicted for setting fire to a mill, with intent to injure the occupiers thereof, and it was ruled that every person must be deemed to intend the necessary consequences of his own acts.

The same ruling has been made by judges in numerous later cases. Thus at Bristol Winter Assize, 1931, Mr. Justice Wright, in summing up in a trial upon an indictment for arson (R. *v.* Porter), said : " a man's intention is presumed from things he does ". This rule of common law has been approved of in the Court of Criminal Appeal in R. *v.* Philpot (1912), 7 Cr. App. R.

In this case the appellant had killed his wife during a quarrel, his trial taking place at the Central Criminal Court on Feb. 1, 1912, before Mr. Justice Ridley. The jury first found " that the prisoner killed his wife ; that he was sane at the time ; that he acted in a fit of temper without

intending to kill her." The judge asked them in what sense they used the words "without intending to kill her". The foreman replied: "The jury are unanimously and emphatically of opinion that at the moment of the act the prisoner did not realize the consequences of what he was doing." The judge then directed the jury to reconsider their verdict, saying that a man is held to intend the consequences of his act.* The jury found the appellant guilty of murder and strongly recommended him to mercy. Per Lord Chief Justice in delivering judgment of Court: "In the circumstances it was not a misdirection to tell the jury that a man is held to intend the consequences of his act. The only act in question was that which caused death, and the appellant who committed this act, if sane, must be held to have intended the consequences."

Rebuttal of Intention.—It is fortunate that his legal presumption of intention is capable of rebuttal in numerous cases, e.g., where at the time of committing the act the accused had not a mind capable of forming an intention; or that he was mistaken as to facts. It must, however, be remembered that the burden of proving the existence of circumstances which rebut the presumption of intention lies on the accused. (N.B.—*See below re* absence of presumption of intention in case of accidents.) There are a considerable number of

* It should be noted that Mr. Justice Ridley did not use the word "unlawful" before the word act.

leading cases in which judges have dealt with the circumstances which may negative the presumption of intention. The following are good examples of such cases.

In R. *v.* Owen (4.C. & P. 236), 1830, Mr. Justice Littledale ruled that in the case of infants between seven and fourteen the common law required strong affirmative proof of sufficient capacity on their part to know the nature and consequences of their conduct. With reference to ignorance of existing facts see R. *v.* Tolson (p. 37). Also R. *v.* Reed (1842) (C. & M., p. 306) in which Mr. Justice Coleridge said: "Ignorance of the law cannot excuse any person, but at the same time when the question is with what intent a person takes, we cannot help looking into their state of mind, as if a person takes what he believes to be his own it is impossible to say that he is guilty of felony."

The doctrine expressed in R. *v.* Reed has been supported by the Court of Criminal Appeal.

In R. *v.* Clayton (15 Cr. App. R. 45, 1920), the appellant had been convicted at Quarter Sessions of stealing thirty shillings from his wife, but he persisted throughout that he had a right to the money. Per Lord Chief Justice: "This conviction cannot stand, and must be quashed. . . . Whether he was right or wrong he had a bona fide belief that he had a right to the money. Therefore the appeal must be allowed."

In criminal charges it may be a good defence to show that the offence charged resulted from an

accident. "An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it."[22] There is, however, a proviso that the act concerned must be a lawful one.[22]

An interesting appeal case in which accident had been pleaded at the trial is that of William Davies (8 Cr. App. R., 1913). In this case the appellant had been convicted of shooting with intent to resist lawful apprehension. The judge told the jury that if the gun were discharged by accident that would not come within the indictment, but that it was for the prisoner and not the prosecution to satisfy them that the act was accidental. The conviction was quashed on appeal, and during the hearing it was made clear that a man is not liable for the consequences of accidental acts and that it is for the prosecution to show that an act is not accidental.

The case of Woolmington *v.* Director of Public Prosecutions confirms the ruling that it rests with the prosecution to show that an act is not accidental.

In this case the appellant's conviction for murder was quashed by the House of Lords (*Times*, April 5 and 6, 1935). On May 23, 1935, the House gave their reason for allowing the appeal (*Times*, May 24, 1935). In the course of this speech the Lord

Chancellor said: "Throughout the web of the English criminal law one golden thread was always to be seen, that it was the duty of the prosecution to prove the prisoner's guilt subject to matters as to the defence of insanity, and subject also to any statutory exception. . . . No matter what the charge, or where the trial, the principle that the prosecution must prove the guilt of the prisoner was part of the common law of England, and no attempt to whittle it down could be entertained."

The rebutting effect of intoxication is discussed under DRUNKENNESS, and reference made to cases in which the judge has referred to the effect of this condition on the capacity to form an intention. (*See* R. *v.* Cruse, R. *v.* Monkhouse, R. *v.* Stopford R. *v.* Meade, and Director of Public Prosecutions *v.* Beard.)

The rebutting effect of insanity is dealt with under INSANITY FROM THE LEGAL POINT OF VIEW.

CONSTRUCTIVE INTENT

Having considered the meaning and significance of the word "intent" it is now necessary to discuss briefly the legal nature of certain crimes which have long been classed as constructive.

Such crimes are committed by persons who, having engaged in unlawful acts, bring about serious results which, in the ordinary sense of the word, they did not intend. By a legal fiction such persons are said to exhibit constructive intent. To use the words of Chief Justice Mansfield in R. *v.*

Woodfall (1770) (5 Burr., 2661): "If an act is in itself unlawful the law implies a criminal intent."

The subject has been frequently dealt with by other writers, and it is only necessary for us to review the position of persons who become involved in constructive crimes.

The authors[22] of Stephen's *Digest of the Criminal Law* quite frankly admit that they consider this subject a very difficult one, and they attribute the difficulty to the statute 23 H.8 c. 1. s. 3, "which took away benefit of clergy in cases of 'wilful murder of malice prepense' and thus created the necessity of preserving the expression 'malice prepense', and at the same time explaining it away. Coke endeavoured to effect this by the doctrine of constructive or fictitious malice, of which, if not the author, he was the most conspicuous expounder."

It was for a long time held that any person who engaged in a felonious act must be held to have intended any results which might arise from this act; an extreme example of this principle was the case of a man who shot at a tame fowl, and instead of killing the fowl killed a human being; such a man would be guilty of murder.[23] Such a ruling was approved of by Lord Chief Justice Cockburn in Barrett's Case. He said (*Times*, April 28, 1868): "If a person seeking to commit a felony should in the prosecution of that purpose cause, although it might be unintentionally, the death of another, that, by the law of England,

was murder. There were persons who thought and maintained that where death thus occurred, not being the immediate purpose of the person causing the death, it was a hard law that made the act murder. But the Court and jury were sitting there to administer the law, not to make or mould it, and the law was what he told them."

More recently the judges have taken a less severe view, and have shown a tendency to restrict such felonies to dangerous felonies. Thus in R. *v.* Serne (1887) (16 Cox, 311) Mr. Justice Stephen said: "I think that instead of saying that any act done with intent to commit a felony, and which causes death, amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony, which caused death, was murder."

In cases where attempts had been made to bring about criminal abortion it was commonly the practice of judges to direct the jury that if death resulted the defendant would be guilty of murder, but in one leading case in 1858 there was some modification of this doctrine; thus in Stadtmuller's Case, tried at the Liverpool Winter Assizes in 1858 before Bramwell, B. (Liverpool Winter Assizes, 1858), the law was thus stated: "If a man for an unlawful purpose used a dangerous instrument and thereby death ensued that was murder, although the person dead might have consented to the act which terminated in death, and although possibly

he might very much regret the termination that had taken place contrary to his hopes and expectations. This was wilful murder. . . . If the jury should be of opinion that the prisoner used the instrument not with any intention to destroy life, and that the instrument was not a dangerous one, although he used it for an unlawful purpose, that would reduce the crime to manslaughter . . ."

In R. *v.* Whitmarsh (1898, 62 J.P., 711), a case involving an unlawful operation by the prisoner, Bigham, J., told the jury that if they should be of opinion that the prisoner could not, as a reasonable man, have expected death to result, they might find a verdict of manslaughter instead of murder. Similar directions were given to the jury by Avory, J., in R. *v.* Lumley (1912, 22 Cox, 635), the prisoner being a physician who had been struck off the register, and was subsequently indicted for wilful murder for attempted criminal abortion. " If you are of opinion . . . that he did the act which is charged against him, but that he had not at the time in contemplation, and would not as a reasonable man have contemplated that either death or grievous bodily harm would result . . . then you would be justified in convicting him of manslaughter."

Mr. Justice McCardie expressed strong opinions regarding constructive felonies in certain cases of alleged criminal abortion tried before him at the Yorkshire Assizes held at Leeds in December, 1931 (*Times*, Dec. 19, 1931). Addressing one defendant

the learned judge said : " You are, however, technically guilty of manslaughter. You have plainly no defence against the present law . . . the very last thing that you desired was the death of the woman at whose request you acted, and yet the charge of wilful murder was made against you."

In the case of William Davies (8 Cr. App. R., 1913) (*see* p. 49) it was made clear that there is no constructive intention in case of accidents.

Two cases involving the doctrine of constructive intent have been considered by the Court of Criminal Appeal and the House of Lords—namely, R. *v.* Meade (1909) and R. *v.* Beard (1920). In R. *v.* Meade (1909) (2 Cr. App. R., p. 47) the prisoner was charged with the murder of a woman whom he had brutally ill-treated during most of the night on which she died, and whose death was alleged to be due to an injury to the intestine caused by a blow with his fist. Lord Coleridge, J., directed the jury that every man is presumed to know the consequences of his act, but if the man is insane such knowledge is not presumed, and where a motive, a particular motive, is in the mind of the man who does the act the law declared that if reason is dethroned (by drink) and the man is incapable of forming that intent, it justifies the reduction of the charge from murder to manslaughter.

In this case the special point appears to have been that the jury must first have satisfied themselves that the prisoner did intend to inflict grievous

bodily harm—that is, to engage in a dangerous felony—in which case he would be guilty of murder. The defence was drunkenness, but he was found guilty of murder, the jury considering that he knew that he was inflicting grievous bodily harm. It should be noticed that the prisoner had previously stated that he would give the deceased a good hiding, and he first used a broomstick for this purpose, and finally struck her on the lower abdomen with a fist. It was a question of fact for the jury whether he intended to inflict grievous bodily harm, and this being so found the only possible verdict could be murder. The Court of Criminal Appeal upheld the judge's ruling and the verdict of the jury.

It is essential to notice in this case that mere chastisement, even with a broomstick, does not of necessity mean that the prisoner intended to engage in a dangerous felony.

In Director of Public Prosecutions *v.* Beard (1919) (14 Cr. App. R.), which is more fully discussed under DRUNKENNESS, it was made quite clear in the House of Lords that the prisoner, having engaged in rape—itself a dangerous felony—there was no necessity for the jury to find that he had engaged in such a felony, and the only defence reducing murder to manslaughter would be the inability to form the intent to commit rape. This was concisely put by the Lord Chancellor in delivering the judgment of the House of Lords. "In Meade's Case the crime charged was that death arose from violence done with intent to cause

grievous bodily harm. In this case the death arose from a violent act done in furtherance of what was in itself a felony of violence. In Meade's Case, therefore, it was necessary to prove the specific intent, in Beard's Case it was only necessary to prove that the violent act causing death was done in furtherance of the felony of rape."

With regard to the defence in cases of constructive murder and other constructive felonies it may be possible for counsel to prove that the accused, by reason of mental disorder, was incapable of forming the intent necessary to constitute the original felony.

Since drunkenness may rebut intention it seems appropriate to deal with this subject in the next chapter.

CHAPTER IV

DRUNKENNESS

THERE has been a considerable number of dicta regarding the plea of drunkenness as affording an excuse for criminal offences. It is beyond doubt that in ancient times it was of no avail for a prisoner to use this defence.

" And he who is guilty of any crime whatever through his voluntary drunkenness shall be punished for it as much as if he had been sober."[24]

" It is a maxim of law that if a man gets himself intoxicated he is liable to the consequences, and is not excusable on account of any crime he may commit when infuriated by liquor". (Per Holroyd, J., in R. *v.* Burrows, 1823, 1 Lewin, pp. 75 and 76.)

" Drunkenness is not insanity, nor does it answer to what is called an unsound mind, unless the derangement which it causes becomes fixed and continued by the drunkenness being habitual, and thereby rendering the party incapable of distinguishing between right and wrong." (Per Holroyd, J., in R. *v.* Rennie, 1825, 1, Lewin, pp. 75 and 76.)

This illogical summing up will be referred to later, but it must be pointed out here that according to the view of this learned judge an habitual

offender might gain exemption from the consequences of his offence, whereas a first offender would not gain such exemption!

The following passage is taken from a classic work[25]: "Again, take the case of drunkenness. A man wildly excited by drink can hardly be said to know at the moment of that excitement that any particular act which he may do is either right or wrong. That which prevents him from knowing is not mistake, but excitement. The reason why ordinary drunkenness is no excuse for crime is that the offender did wrong in getting drunk; but a person brought into this state by some kinds of fraud is said by Hale[26] to be in the same position as a man suffering under 'any other frenzy'."

The harsh rules regarding drunkenness have been gradually relaxed, and there are circumstances under which an intoxicated person may escape some of the consequences which would otherwise result from any felonious act committed by him.

There is still some confusion existing with reference to the connection between drunkenness and insanity, and certain judicial dicta are hard to understand when examined in the light of modern knowledge regarding the nature of insanity. A distinction has been drawn between drunkenness, and insanity due to drunkenness—well illustrated in R. *v.* Davis, 1881 (14 Cox, 563) (*see below*), and it appears that in a trial different results might follow, the difference depending upon whether an accused person were suffering from what is termed

insanity or merely from acute intoxication. It is now well known that insanity in the common sense of the word may result from chronic alcoholism, but it is not so generally realized that a person under the influence of large amounts of alcohol is suffering from a temporary acute insanity.

This fact is well brought out by Charles Mercier,[16] and it has been recognized by other authorities. Insanity, says Mercier, may last from a minute to a life-time; he further states that no substance is more satisfactory than alcohol for producing temporary insanity for experimental purposes. His statements are quite definite and to the point. He writes: "It is literally and exactly true that drunkenness is insanity; that as long and as far as a man is drunk, so long and so far is he insane" . . . "many vegetable poisons produce like alcohol a temporary delirium, and as with alcohol their prolonged use renders the insanity permanent" . . . "and from whatever point of view we regard drunkenness, we cannot fail to see that its nature is that of a transient and toxic insanity."

Mercier is not alone in considering acute alcoholism to be a form of acute insanity. Thus Osler[19] writes: "(*a*) Acute alcoholism: When a large quantity of alcohol is taken the influence is chiefly on the nervous system, and is manifested in muscular inco-ordination, mental disturbance, and finally narcosis." Later, he states: "Acute alcoholism rarely requires any special measures as the patient sleeps off the effects of the debauch. . . . In the

acute, violent alcoholic mania the hypodermic injection of apomorphia is very effectual, causing rapid disappearance of the maniacal symptoms."

Craig[27] states: "The forms of alcoholism to which we shall refer include both acute and chronic intoxication. In the former the mental disorder is largely due to the direct toxic influence of the poison on the brain, while in the latter it is often the result of structural alterations in the cerebral blood-vessels and nervous elements. . . . Alcohol exaggerates the normal temperament. The weak-minded person becomes under its influence, foolish; the morose man weeps; the excitable man becomes merry and exalted. All the types of mental disorder associated with acute intoxication need not be described; they vary from stupor and mental confusion to wild excitement. The vast majority of intoxicated individuals recover within a few hours, but occasionally cases occur in which the mental disorder persists for days or weeks."

Stoddart,[28] under alcoholic psychoses writes:—

"1. *Physiological Inebriation.*—This condition is a passing disturbance of the physical and mental functions induced by a poisonous dose of alcohol.

"2. *Pathological Inebriation.*—This disorder is usually caused by much smaller quantities of alcohol than are necessary to induce the condition above described; in some cases one or two glasses of beer are sufficient. It arises in patients with congenital or acquired neuropathic taint. The commonest form, 'mania a potu' is an attack of

intense motor excitement. The patient appears to be in a state of semi-consciousness, and to have absolutely no control of his actions. In his violent fury he may attempt homicide. Indecent exposure, carnal assaults on women, incendiarism and theft are common, the patient remembering little of such incidents on his recovery."

If we critically examine some of the leading cases in which drunkenness has been pleaded as a defence, we cannot fail to realize the great variety of opinions held by different judges. (*See* R. *v.* Burrow and R. *v.* Rennie *above*.)

Apparently the first case in which the plea of drunkenness was allowed as a defence was Rex *v.* Grindley in 1819, at Worcester Summer Assizes (Russ., p. 88). Since this case the defence has been allowed in numerous cases, some of which may be referred to:—

In R. *v.* Cruse 1838 (8 C. & P., p. 541) per Patterson J.: "And although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be unable to form any intention at all."

In R. *v.* Monkhouse 1849 (4 Cox, p. 55) per Coleridge, J.:—"Drunkenness is ordinarily neither a defence nor excuse for crime; it rests on the prisoner to prove it, and it is not enough . . . unless the intoxication was such as to prevent his restraining himself from committing the act in question,

or to take away from him the power of forming any specific intention."

It must be noted that the dictum re " restraining himself " has since been definitely over-ruled (R. *v.* Burton 1863, 3. F. & F., p. 772; and later in Director of Public Prosecutions *v.* Beard 1919, 14 Cr. App. R.).

In R. *v.* Stopford 1870 (11 Cox, 643) per Brett, J.: " For unless he was so drunk that he was utterly and consequently incapable of having any intent . . . he is guilty."

In R. *v.* Davis 1881 (14 Cox, 563) per Stephen, J.: " But drunkenness is one thing and the diseases to which drunkenness leads are different things; and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, as would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible. In my opinion, in such a case, the man is a madman, and is to be treated as such, although his madness is only temporary."

After explaining the rule in McNaghten's Case as being applicable to delirium tremens, which is not the primary but the secondary result of drinking, the learned judge directed the jury that if they thought there was a " distinct disease " caused by drinking but differing from drunkenness, and obliterating the knowledge of good and evil to bring in the statutory verdict as in a case of " ordinary " insanity. This they did.

In R. *v.* Baines (*Times*, Jan. 25, 1886) the prisoner was charged with the murder of his wife. During the trial it was stated that the prisoner had at one time been treated for delirium tremens. In his address to the jury Mr. Justice Day said: "I have ruled that if a man were in such a state of intoxication that he did not know the nature of his act, or that his act was wrongful, his act would be excusable." The jury returned a verdict of "Guilty." His Lordship expressed concurrence with the verdict.

In R. *v.* Doherty 1887 (16 Cox, 306) per Stephen, J.: "You have to consider the effect of his drunkenness on his intention."

In R. *v.* Meade 1909 (2 Cr. App. R.) per Lord Coleridge: "The law declares this—that if the mind at the time is so obscured by drink, if the reason is dethroned, and the man is incapable of forming that intent, it justifies the reduction of the charge from murder to manslaughter."

In Director of Public Prosecutions *v.* Beard 1919 (14 Cr. App. R.) per the Lord Chancellor: "The law takes no note of the cause of insanity. If actual insanity in fact supervenes, as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause."

"That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so

that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts."

This case clearly indicates that the McNaghten Rule does not suggest that any distinction should be drawn between the case of mental disorder wilfully caused such as by alcohol or acquired syphilis, or involuntarily acquired.

The legal mind seems very much disposed to lay great stress on the difference between drunkenness and " insanity caused by drunkenness ". This is quite clearly shown in the case of R. *v.* Davis (*see above*), where the prisoner was suffering from delirium tremens—a disease caused by drunkenness, and in which the learned judge somewhat unscientifically referred to " ordinary " insanity. It is also surprising that Kenny[29] also refers to " actual insanity ". The distinction is also demonstrated by the remarks of the Lord Chancellor in Director of Public Prosecutions *v.* Beard 1919 (14 Cr. App. R.), where he says, " if actual insanity supervene ". Not only do these words infer that there is a pseudo-insanity, but they also indicate that the learned Lord Chancellor did not recognize the possibility that drunkenness and insanity might virtually coincide in onset and duration, and that acute drunkenness is acute insanity !

The Lord Chancellor also said in this case : " The distinction between the defence of insanity in the true sense caused by excessive drinking and the defence of drunkenness which produces a condition

such that the drunken man's mind becomes incapable of forming a specific intention has been preserved throughout the cases." It would appear from certain words used in delivering the judgment of the Court of Criminal Appeal in R. *v.* Meade 1909 (2 Cr. App. R.) that Mr. Justice Darling realized that acute drunkenness might be acute insanity. "Originally the law was that although an insane person was not liable to the same consequences, and ought not to be judged by the same standard as a sane one, yet, if he was suffering from dementia affectata, that is a temporary insanity caused by the accused's own voluntary act in getting drunk, then drunkenness was no excuse for crime."

In the case of R. *v.* Beard and similar cases, we submit that if at the time of the crime the prisoner had been suffering from acute intoxication two different pleas would have been available: (1) Plea of insanity following the McNaghten Rule; (2) Plea of incapacity to form an intent of any kind, owing to the state of intoxication.

This submission, however, is not supported by the remarks of Mr. Justice Bailhache when directing the jury in this case (1 K.B. 895): "But if he has satisfied you by evidence that he was so absolutely drunk at the time that he really did not know what he was doing, or did not know that he was doing wrong, then the defence of drunkenness succeeds to this extent, that it reduces the crime from murder to manslaughter." Furthermore in

the same case, during the appeal, the Lord Chancellor said (14 Cr. App. R., H. L.): "It is noteworthy that notwithstanding that the judges ever since McNaghten's Case in 1843 have had these questions in mind as the test of insanity there is no single case known to me where drunkenness has been the defence, in which the judge has directed the jury to consider whether the prisoner knew that he was doing wrong. Whenever this question has been put the defence has been that there existed insanity caused by drink."

It is worthy of note that during the hearing of this appeal Lord Haldane made it quite clear that his views on the relationship between drunkenness and insanity were not in keeping with the views of most legal authorities. He is reported as saying (at p. 173, 14 Cr. App. R.): "Why should dementia of a temporary kind produced by drink be in any different position from any other kind of dementia? In civil cases it is not. There is an immense deal of authority on drunkenness, and the effect has been to put it substantially on the same footing as any other form of madness. Why should it be different in the criminal law?"

In the chapter on MIND we endeavoured to make it clear that whatever views be held regarding the exact relationship between mind and brain there is abundant scientific evidence to show that there is some close connection between certain processes taking place in brain cells and mental activity. As pointed out, post-mortem examinations of persons

who have exhibited for long periods during lifetime symptoms of insane mental disorder, in a majority of cases reveal an alteration in the structure of some of the cells of the brain which is known as cell degeneration. There is also evidence to show that such changes in brain cells may be brought about by alcohol.

Let us now come to closer quarters with certain aspects of alcoholic insanity, and inquire why so many people fail to realize that an acute form of insanity can be rapidly produced by alcohol. The probable reason is that most people regard insanity to be a disease of some considerable duration, lasting from months to many years ; a little careful thought and inquiry will show that this view is quite fallacious.

We have already stated that it is by no means uncommon for persons suffering from acute diseases such as pneumonia, and other less acute diseases such as typhoid fever, to exhibit during the course of the disease all the signs and symptoms of an insanity of short duration, the toxin in most cases being eliminated by the excretory mechanisms of the body before it has had time to damage cerebral tissue permanently. Such a state of affairs does not always prevail, and in some other diseases, notably syphilis and epidemic encephalitis, the exogenous toxins may produce a permanent change in the cerebral tissues, coincident with permanent mental disorder.

The reason why an acute alcoholic insanity may

be of very short duration is that the sufferer from an overdose of alcohol frequently becomes somnolent, and refrains from a further ingestion of the toxic substance, which is partly oxidized to carbon dioxide and water and removed by the respiratory mechanism, and partly excreted unchanged by the kidneys.

If, instead of occasional drunken carousals with fairly long intervals between them, a person becomes addicted to the persistent and regular use of excessive amounts of alcohol, permanent damage to the cerebral tissue may, and frequently does, supervene. The difference between acute and chronic alcoholic insanity is therefore quite definitely one only of degree and not of kind, the poisoning of the brain cells going a stage further in the latter form.

The action of alcohol on the cells of the brain may be compared with the action of such an anæsthetic as chloroform, and it is actually used in combination with other drugs to produce anæsthesia.

It has been suggested that in anæsthesia the chloroform forms thin layers surrounding and temporarily paralysing the cerebral cells[30] and that other toxins act in a similar way.[31] These deposited layers of anæsthetic or toxin are called "adsorption layers" and are probably the seat of great activity. Langmuir[32] has shown that an extremely thin layer of adsorbed material may alter many properties of the solid so covered.

If the adsorption layers of toxic substances on

brain cells are not removed, they doubtless permeate the whole structure of the cells, producing permanent changes within them, and contributing to a lasting disorder of the mental processes.

It may now be helpful to summarize briefly the chief points which support the contention that acute drunkenness is acute insanity :—

1. The onset and the duration may be brief, as in some other forms of acute mental disorder.

2. The disorder of conduct coincides with the disorder which occurs in persons who are admittedly suffering from acute toxic insanity.

3. Alcohol is a very definite poison for cerebral cells, the amount required to produce a toxic effect varying with different individuals.

4. No permanent structural change occurs in the central nervous system.

5. The persons affected may be a source of danger to themselves or others.

6. The persons affected may be unaware of the nature and quality of their actions, and may be unable to distinguish between right and wrong.

7. The persons affected may be incapable of reflective thought, and therefore unable to form specific intents.

8. They may be the subjects of illusions, hallucinations, and delusions.

9. In drunkenness, as in other forms of insanity, the law of dissolution holds good, which law postulates that those parts of the brain which are developed latest are affected first. Acutely

inebriated persons present, in fact, signs and symptoms which conform with those signs and symptoms exhibited by acutely insane people.

DIAGNOSIS OF DRUNKENNESS

It is quite common for those people who frequent Assize Courts and other tribunals to hear witnesses refer to various tests by which they have arrived at the conclusion that a particular individual was, or was not, drunk at a specified time. We remember a police officer who, when questioned as to the condition of an accused person at a particular time dogmatically stated that he was drunk ; in cross-examination the officer admitted that he had arrived at this conclusion largely because the accused person had lolled about at the police station. It subsequently transpired that the defendant was suffering from a nervous disability and that he was not inebriated, the jury bringing in a verdict of " Not guilty " of the offence charged—namely, manslaughter.

It is not only police officers who make such mistakes, as it is a matter of extreme difficulty in many cases to arrive at a definite decision regarding the question whether or no a person is intoxicated. Furthermore, there is no precise definition of the word " drunk ", and this has been recognized in Sect. 15 of Road Traffic Act 1930—" any person who when driving or attempting to drive, or when in charge of a motor vehicle on a road or other public place is under the influence of drink or a

drug to such an extent as to be incapable of having proper control of the vehicle commits an offence."

A committee of the British Medical Association[33] after careful deliberation arrived at the following definition of drunkenness: "That the word 'drunk' should always be taken to mean that the person concerned was so under the influence of alcohol as to have lost control of his faculties to such an extent as to render him unable to execute safely the occupation in which he was engaged at the material time."

For practical purposes a person may be considered as drunk when under the influence of alcohol to such an extent as to be a danger to himself or to other people. Incidentally, the question of being dangerous to one's self or to others is the chief criterion for deciding whether a mentally disordered person shall or shall not be certified as insane.

It would remove much of the misapprehension with regard to the diagnosis of drunkenness if people would recognize that this state is actually a temporary acute toxæmia, chiefly affecting the brain and producing mental disorder as shown by change in conduct.

We do not propose to go into great detail with regard to the methods of diagnosing drunkenness, but there are several facts with which all advocates should be acquainted.

1. That many of the tests used are quite empirical and eminently unsatisfactory. Many sober persons

could not clearly say the words "Royal Irish Constabulary" or "British Constitution". We knew a learned clergyman who could not clearly read the words "the tenth a chrysoprasus". It is also a fact that many educated people stammer very badly, especially when excited. It is thus clear that it may be quite useless to deduce any useful facts from the common test of asking an arrested person to do things under mental stress which many persons cannot do in their normal state.

2. That some of the signs mentioned by doctors to have been exhibited by alleged drunken persons may be due to the fact that the individual concerned was suffering from some nervous disease; for this reason certain pupil reactions must be received with an open mind.

3. That there are fallacies connected with even the most modern tests for drunkenness, e.g., the examination of the blood or urine, or of both for the presence of alcohol.[34] Every adult layman of reasonable intelligence must be well acquainted with a fact recognized by all medical men, that the amount of alcohol required to render a person dangerous to himself or others is a variable quantity, and a dose which might render one man a dangerous lunatic for a short time might make another man just a little more cheerful than usual, and produce no marked change in his conduct.

4. That the only way to avoid the possibility of making a serious error in diagnosis is to make a complete clinical examination of the person

concerned, especially noting the condition of the central nervous system. This examination should be made as soon as possible after a person is suspected of being intoxicated, and it is highly desirable that a similar examination should be made at a later period—next day, for instance—no alcoholic drink having been taken in the interval. We have unfortunately seen cases in which a diagnosis of drunkenness has been incorrectly made owing to failure on the part of the examining doctor to take these precautions.

In 1925 there was some interesting correspondence in the *British Medical Journal* concerning the diagnosis of drunkenness. Sir James Purves-Stewart, who is an advocate of a careful and systematic clinical examination in the elucidation of this problem—as against empirical signs—contributed a letter[35] which contained the following striking remarks: "This craving for a new sign implies a total misapprehension of the lesson I wished to convey. St. Paul remarked to the Corinthians that 'the Jews require a sign, and the Greeks seek after wisdom'."

It is desirable that an advocate should not only realize the great importance of an exhaustive clinical examination, especially of the nervous system, but he should also be acquainted with some of the special tests usually applied to persons being examined for drunkenness.

1. The person may be asked to pronounce difficult words or to read sentences which contain

such words; the fallacies connected with this test have been referred to.

2. The person's memory for old and recent events may be tested; here again it must be remembered that organic diseases may affect the memory.

3. Muscular co-ordination may be investigated, as by asking the person to sit on the floor and get up again without support or assistance of any kind. Muscular inco-ordination may be produced by alcohol, and also by organic disease, notably syphilis.

4. The person may be asked to join by straight lines a series of dots made on a piece of paper.

5. The person may be asked to write a paragraph.

6. The urine, voided in presence of examiner, may be examined for presence of alcohol, a quantitative analysis being desirable.[34]

7. The test of ability to walk along a straight line may be made; this test is quite a useful aid to diagnosis, always bearing in mind the influence of certain nervous diseases on this ability.

8. Careful notice is taken of the person's general demeanour, his dress, etc.

9. Certain reflexes of the pupil should be examined in cases of suspected drunkenness. These reflexes are referred to under INSANITY. These reactions of the pupil of the eye were considered by Glaister[36] to be of the greatest importance in the diagnosis of alcoholic intoxication. He used the pupil reaction extensively since 1878 and found it very reliable.

If an intoxicated person, completely unconscious, is allowed to be unmolested for half an hour the pupils will be contracted, but will gradually dilate when the person is stimulated by slapping, pulling the hair, etc. They will contract again if the person be left alone. Even in lesser degrees of alcoholic intoxication it is considered by many authorities that the pupil reflex is modified, taking longer to react to light, or requiring a brighter light than normal to cause contraction and the pupil remaining contracted for an abnormally long time after light stimulation.

As stated above, any abnormalities of the reaction of the pupils must be very carefully investigated, one of the commonest later manifestations of syphilis being the absence of the normal response of the pupils to light. When an advocate realizes that it is only possible to make a correct diagnosis of drunkenness, or of being under the influence of alcohol, by a carefully selected series of tests, coupled with an exhaustive clinical examination, it should not be difficult for him in cross-examination to shake a dogmatic witness who has relied entirely upon diagnosis by a number of antiquated and empirical tests.

CHAPTER V

IRRESISTIBLE IMPULSE

It has been suggested on several occasions that in considering those disabilities which might exempt a person from full criminal responsibility allowance should be made in the case of persons who are alleged to suffer from an abnormal mental condition in that they are liable to commit offences under the influence of an irresistible impulse.

An examination of the literature on the subject seems to indicate that whereas medical opinion tends to favour the inclusion of this type of mental disorder among the exempting causes, legal opinion is strongly opposed to any such limitation of responsibility, based on so eminently unsatisfactory a plea.

We do not deny the possibility that a person may suffer from an uncontrollable desire to commit certain offences, but we submit that it is almost, if not quite, an impossibility to convince a jury beyond reasonable doubt that any individual suffers from such a disability. If such an exemption were allowed there would be a grave risk that individuals possessed of violent passions would more readily give way to them, and subsequently seek to excuse themselves from responsibility on the plea of irresistible impulse.

In a number of earlier cases the judge directed the jury that uncontrollable impulse might be a defence. Thus in R. *v.* Oxford (9 C. & P., 1840) Denman, J., said : " Persons prima facie must be taken to be of sound mind till the contrary is shown. But a person may commit a criminal act, and yet not be responsible. If some controlling disease was in truth the acting power within him, which he could not resist, then he will not be responsible."

Similar views have certainly been expressed occasionally in later years, for example, in the case of R. *v.* True (q.v.), but more usually judges have expressed disapproval of a defence involving such a plea. Thus in R. *v.* Haynes (1859) (1 F. & F., 666), in summing up to the jury Bramwell, B., said : " it has been urged for the prisoner that you should acquit him on the ground that, it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence. . . . But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, the restraint of conscience, and the restraint of law."

The case of R. *v.* Burton (1863) (3 F. & F., 772) illustrates well the respective views of the medical and legal professions. In this case a doctor deposed

that he had attended the prisoner on two occasions, and believed that he was suffering from moral insanity—that is, he knew perfectly well what he was doing, but had no control over himself. Wightman, J., in summing up, referring to the medical evidence, said: "The medical man called for the defence defined homicidal mania to be a propensity to kill; and described moral insanity as a state of mind under which a man, perfectly aware that it was wrong to do so, killed another under an uncontrollable impulse. This would appear to be a most dangerous doctrine, and fatal to the interests of society, and to security of life."

In 1922 a committee was appointed by the Lord Chancellor to consider if any changes were desirable with regard to the law relating to criminal trials in which insanity was pleaded. Lord Justice Aitken was president of this committee. The Council of the British Medical Association tendered evidence, and considered that no act should be regarded as a crime if at the time of the act the person who did it was prevented by disease of the mind from controlling his own conduct, unless this absence of control was directly brought about by his own default. The committee so far agreed with this suggestion as to recommend that it should be recognized that a person charged criminally with an offence was not responsible for his act when the act was committed under an impulse which he was by mental disease deprived of the power to resist.

This recommendation of the acceptance of the plea of irresistible impulse was submitted to twelve High Court Judges for an opinion as to the advisability of giving legislative effect to the recommendation. Ten of the judges advised against this step.

In the same year that the commission sat, an eminent judge directed the jury that, in his opinion, the plea of irresistible impulse was a valid one. Thus, in the case of Ronald True,[37] who was tried for murder at the Central Criminal Court before Mr. Justice McCardie in May, 1922, during the course of his summing up the judge said (*Times*, 1922, May 6): "I shall put this point to you—that even if the prisoner knew the physical nature of the act, and that it was morally wrong and punishable by law, yet was he through mental disease deprived of the power of controlling his actions at the same time? If 'yes', then, in my view of the law, the verdict should be 'guilty, but insane'. . . ."

Remarks made during the delivery of the judgment of the Court of Criminal Appeal clearly indicate that this Court refuses to accept the plea of irresistible impulse *per se* as a defence, but at the same time it is equally clear that the Court has never denied the possibility that a defendant who is proved to be the subject of an irresistible impulse may indirectly come within the McNaghten Rule.

The two following cases are of importance. Joseph Edward Flavell (19 Cr. App. R., pp. 141–3, 1926). In this case counsel for the applicant urged

that the defence of uncontrollable impulse should be accepted, in view of the recommendation made by the 1922 Commission.

Per Sankey, J.: "We desire to express no opinion on the desirability of altering the law, or whether it should be altered by legislation or by pronouncements in this Court. But we do say not only that the rules in McNaghten's Case stand at present, but also that if we were to alter them to give effect to the contentions of counsel we should be going further than interpreting these rules. . . ."

Alfred Arthur Kopsch (1925) (19 Cr. App. R., p. 50).—Application for leave to appeal against conviction and sentence of death for murder passed Oct. 19, 1925. In this case it was urged by applicant's counsel that there was evidence that the defendant, in doing the criminal act, did it under the influence of his subconscious mind, but that the judge did not direct the jury that a person who commits an act under an impulse, which, by mental disease he cannot control, is not criminally responsible for it.

Per Lord Chief Justice (pp. 51–2): "the complaint against the judge is that he did not tell the jury that something was the law which was not the law. The argument of counsel for the defence began with the proposition that the law was as he represented, but as it proceeded drifted into the different position that the law ought to become, or ought to have become, what he represented.

" It is the fantastic theory of uncontrollable impulse which, if it were to become part of our criminal law, would be merely subversive.

" It is not yet part of the criminal law, and it is to be hoped that the time is far distant when it will be made so. . . ."

(*See further* Chapter VII, SIGNIFICANCE OF THE MCNAGHTEN RULE.)

CHAPTER VI

INSANITY FROM THE LEGAL POINT OF VIEW

The present law as to insanity in connection with criminal cases has arisen in three stages.

1. In Rex *v.* Arnold (1724) (16 St. Tr., 695) and in R. *v.* Earl Ferrers (1760) (19 St. Tr., 885) it was ruled that a man could not be acquitted on the ground of insanity unless he was totally deprived of understanding and memory, and did not know what he was doing any more than an infant, a brute, or a wild beast.

In the former case Tracy, J., in charging the jury said: "It is not every kind of idle and frantic humour of a man, or something unaccountable in his actions which will show him to be such a madman as is to be exempted from punishment". The learned judge then set forth his views with reference to memory and understanding as quoted above.

2. In R. *v.* Bellingham (1812) (Collinson, Lun., 636), the test applied was whether, when the act was done, the prisoner was capable of distinguishing right from wrong, or was under the influence of any delusion which rendered his mind insensible of the act.

It would serve no useful purpose to quote from

a large number of judicial addresses to juries prior to 1843, but one more case will be referred to as it brings out the most important points which were shortly after incorporated in the McNaghten Rule.

In R. *v.* Oxford (1840) (9 C. & P., 525) Mr. Justice Denman said: "Persons prima facie must be taken to be of sound mind till the contrary is shown. . . . The question is whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character and consequences of the act he was committing, or in other words whether he was under the influence of a diseased mind, and was really unconscious, at the time he was committing the act, that it was a crime."

3. The case of Daniel McNaghten is so important that it is dealt with fully below.

THE MCNAGHTEN RULE

In order to understand the meaning of the words* "the legal definition of insanity" which have been used in connection with the plea of insanity put forward on behalf of persons charged with criminal offences, it is necessary to give an account of McNaghten's Case and the events which followed it. (10 Cl. & F., p. 200.)

The prisoner, Daniel McNaghten, had been indicted at the Central Criminal Court for the murder of Edward Drummond, secretary to Sir

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* *See* case of James Macdonald (p. 13).

Robert Peel, by shooting him in the back on Jan. 20, 1843. The prisoner pleaded not guilty.

At the trial medical evidence was brought forward to show that he was affected by morbid delusions. Tindal, C. J., directed the jury that the question to be determined was whether at the time the act in question was committed the prisoner had, or had not, the use of his understanding, so as to know that he was doing a wrong or wicked act. The result of the trial was an acquittal.

This case attracted great public attention, and became the subject of debate in the House of Lords. The House determined to take the opinion of the Judges on the law.

On June 19, 1843, all the judges attended the House of Lords, when the following questions of law were propounded to them.

(1) What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some supposed public benefit?

(2) What are the proper questions to be submitted to the jury when a person alleged to be afflicted with an insane delusion respecting one or more

particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence ?

(3) In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed ?

(4) If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused ?

(5) Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusion at the time ?

Lord Chief Justice Tindal :—

" My lords, her Majesty's Judges, with the exception of Mr. Justice Maule, who has stated his opinions to your lordships, in answering the questions proposed to them by your lordships' House, think it right in the first place, to state that they have forborne entering into any particular discussion upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are brought judically before them.

"The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case.

"As it is their duty to declare the law upon each particular case on facts proved before them, and after hearing argument of counsel thereon, they deem it at once impracticable, and at the same time dangerous to the administration of justice if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your lordships' questions.

"They have, therefore, confined their answers to the statement of that which they hold to be the law upon the abstract questions proposed by your lordships; and as they deem it unnecessary, in this particular case, to deliver their opinions seriatim, and as all concur in the same opinion, they desire me to express such their unanimous opinion to your lordships."

ANSWERS

"(1) Assuming that your lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects, insane, we are of opinion, that, notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of

the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land.

" (2 & 3) That the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction ; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong.

" The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely if ever leading to any mistake with the jury, is not as we conceive so accurate when put generally, and in the abstract, as when put as to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference

to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that everyone must be taken conclusively to know it without proof that he does know it.

" If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

" (4) The answer to this question must of course depend on the nature of the delusion; but making the same assumption as we did before, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real.

" For example, if under the influence of his delusion, he supposes another man to be

in the act of attempting to take away his life, and he kills that man, as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

" (5) We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to which it is for the jury to decide : and the questions are not mere questions upon a matter of science, in which case such evidence is admissible.

" But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

It may be useful to consider some of the points dealt with in the answers.

Presumption of Sanity.—The essential point to notice is that the onus of proving insanity lies entirely with the defence.

This was laid down by Mr. Justice Denman in R. *v.* Oxford (p. 83) : " Persons prima facie must

be taken to be of sound mind till the contrary is shown." *See also* R. *v.* Stokes (p. 91). It was referred to in the Court of Criminal Appeal in the case of Oliver Smith (6 Cr. App. R., 1910, 19). During this appeal the question arose as to the duty of the counsel for the Crown with regard to tendering evidence of a prisoner's insanity. This point is referred to under ADVOCACY.

See also Woolmington *v.* Director of Public Prosecutions (*Times*, May 24, 1935, and p. 49).

"At the Time".—One of the most definite requirements of the McNaghten Rule is that no exemption from criminal responsibility can be claimed even by a person who is generally in a state of mental disorder constituting insanity unless it can be proved to the satisfaction of the jury that such a condition prevailed at the time of the alleged offence. This being so, it is theoretically possible for an insane person to have sane intervals during which he possesses full criminal responsibility; conversely, it is possible for a person who is usually sane to have periods of temporary insanity during which he is excused from criminal responsibility.

It may be of interest to consider some of the views which have been expressed with reference to this particular question; it is ably dealt with by Oppenheimer,[1] a physician and lawyer, in his text-book previously referred to, chapter fourteen dealing with "the critical moment". He points out that different rules prevail in different countries

as to the interpretation of the time factor in criminal actions.

It might well be insisted that some consideration should be given to the time at which the intent to commit the crime was formed, and a man might theoretically be held responsible who was proved to be sane when he formed his criminal intent, and yet insane when he carried out the practical details of the crime. There can be little doubt that in English law the reference to time refers to the act itself, and not to the intent.

This was clearly laid down by Chief Justice Kenyon before the McNaghten Rule was formulated.

In Hadfield's case (1800) (27 St. Tr., p. 1281) he directed the jury : " The material part of the case is, whether at the very time the act was committed this man's mind was sane." Moreover, the McNaghten Rule includes the words " of the committing of the act " as a part of the time factor.

Many subsequent cases have occurred where reference to time has been made by the judge in summing up. Thus in R. *v.* Stokes (1848) (3 C. & K., p. 185) Rolfe, B., said : " If the prisoner seeks to excuse himself on the plea of insanity it is for him to make it clear that he was insane at the time of committing the offence charged."

In R. *v.* Jefferson (1 Cr. App. R., 1908, p. 97), by Lawrance, J. : " There was very strong evidence before the jury that this man, at the time he

committed the offence, was not in a state of mind to make him responsible for his actions." (Special substituted for death sentence.)

In R. *v.* John William Smith (5 Cr. App. R., 1910) per Darling, J.: "As to his state of mind at the time of doing the act, you are to look at the evidence before and after the act, and throughout the commission of the act. Mr. David pressed upon us that we should take into account the state of appellant's mind weeks before April 1 [date of crime]. . . . But it is not a reason that because he might have been insane then, he is therefore insane later on . . ."

In the case of Michael Collins (6 Cr. App. R., 1911): "The medical officer who had the prisoner under observation agreed that he had known cases where a person committed a terrible crime who was perfectly sane shortly before committing it, and the same shortly after the deed was done."

The fact that different forms of epilepsy may exist, and that a prisoner may be liable to one of these attacks of temporary mental confusion, is, of itself, not sufficient to bring the prisoner within the McNaghten Rule unless it is proved to the satisfaction of the jury that such a mental state existed at the very time when the crime was committed. This is well illustrated by the case of Henry Perry (*see* p. 35), where the Lord Chief Justice said: "The crux of the whole matter is whether this man was suffering from epilepsy at the time he committed the crime."

It is essential to notice here that, as the mental condition of a person at the time of an act charged is always a question of fact for the jury to decide, in cases such as the above medical evidence should be brought forward as to whether a chronic epileptic is more likely than a normal person to commit an act concerning the nature and quality of which he would be unaware at the time of its commission. Evidence should also be brought forward that it is quite possible for a man to be sane one moment and insane the next, and vice versa. Such evidence was produced in the case of Michael Collins (p. 92).

"Defect of Reason".—The word "reason" is an interesting one, and has more than one definite meaning.

There is no doubt that in connection with the subject now under discussion it refers to the power of abstract thought. The faculty of reason distinguishes men from all the other higher animals; it is noticeable that Coke's definition of murder* includes the words "the slaying of a reasonable creature".

So far as is known with certainty a human being alone possesses the power of contemplation quite apart from any sensory impressions received from outside or from within. A dog, for example, roused from sleep may walk in this direction or that

* "Where a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the King's peace with malice aforethought, either express or implied, the death following within a year and a day."[38]

impelled by impressions received from without by one or more of its sensory organs, or from within from the visceral or genital systems, etc. A man, on the other hand, can apparently engage in the critical processes of mental analysis and work out numerous problems quite at his own volition, unhampered and unguided by sensory impressions received at the time these problems are being solved.

He can thus decide to commit murder, and later either accomplish his purpose, or refrain from the act. The power of such abstract thought is possessed in varying degree by different people.

It should be specially noted that the "defect of reason" must be due to "disease of the mind". This was emphasized by Lord Hewart in R. *v.* Anderson (p. 98). We find it difficult to think of any cause for "defect of reason" other than "disease of the mind". It is, however, not generally recognized that the delirious condition produced by acute alcoholic poisoning, and also by certain bacteria, is a temporary but definite form of insanity!

"Disease of the Mind".—This has been dealt with under MIND and INSANITY.

"Nature and Quality".—These words have been the subject of much discussion. Kenny[29] considers that the two words are synonymous, and he is not alone in his view.

In a leading article on criminal responsibility in the *British Medical Journal*, comment is made of the fact that the words "and quality" were

omitted by Sir Edward Marshall Hall, K.C., in an article written by him in the *Sunday Express*.[40] To quote the words in the medical journal above referred to: "What, then, is meant by knowing, or being aware of, the quality of an act? Elaborate interpretations of a far-fetched nature have been suggested by writers on this question, but in its simplest sense surely a 'quality' is that which produces a feeling or sensation about the object possessing the quality. To know the quality of an act must therefore be to have such a sensation or feeling about the act as ordinary normal people would have—that is to say, to have normal feeling about the act."

We think that the judges who were responsible for the famous "answers" could not have intended two different words to mean exactly the same thing.

We understand that a knowledge of the "nature" of an act simply refers to the physical nature of the act, e.g., that the act in question is a striking, a shooting, an administration of a noxious substance, etc.; but that the word "quality" refers to a knowledge of the probable or possible results of the act, e.g., that a blow with a hammer is more likely to inflict grievous bodily harm than a blow with the fist, or that the administration of a poisonous substance is more likely to cause death than the administration of water.

In R. *v.* Pank (*Times*, May 22, 1919, and Kenny[29]) Mr. Justice Darling directed the jury:

" He knew the nature and quality of the act; for he knew that he was shooting, and that this shooting would kill her." This direction is in keeping with the view we have expressed regarding the meaning of the two words.

It has been laid down by the Court of Criminal Appeal that the words refer only to the physical and not the moral aspects of the act. Thus, in the case of Georges Codere—(1916) 12 Cr. App. R., p. 21, per Lord Chief Justice (p. 26, 7): " It is said that 'quality' is to be regarded as characterizing the moral as contrasted with the physical aspect of the deed. The Court cannot agree with that view of the meaning of the words 'nature and quality'.

" The Court is of opinion that in using the language 'nature and quality' the judges were only dealing with the physical character of the act, and were not intending to distinguish between the physical and moral aspects of the act.

" That is the law as it has been laid down by judges in many directions to juries, and as the Court understands it to be at the present time."

" That it was Wrong ".—If we consider the remarks made by certain of our judges during the early part of the nineteenth century we cannot fail to realize that in their view the question to decide was whether the person charged was aware that his act was morally wrong. Thus in Bellingham's Case (p. 82) Lord Mansfield directed the jury that the test to apply was whether the prisoner

was capable of distinguishing between right and wrong.

In R. *v.* Offord (5 C. & P., 168) Lord Lyndhurst ruled that to excuse a man from punishment on the ground of insanity it must be proved distinctly that he was not capable of distinguishing right from wrong at the time he did the act, and did not know it to be an offence against the laws of God and nature.

Oppenheimer[1] considers that the word " wrong " should be taken to mean illegal, and he is supported in this view by the " answers " of the judges to the questions propounded to them in connection with the formulation of the McNaghten Rule.

Baron Bramwell made very definite reference to the law of the land in R. *v.* Dove (*Times*, July 21, 1856). Having explained to the jury that to establish a defence on the ground of insanity the prisoner must prove that he did not know that he was doing what was wrong, he said: " Of course that means doing an act prohibited by law; because a man might imagine that killing was a right thing to do, and it might be contrary to law."

The meaning of the word " wrong " has been discussed in the Court of Criminal Appeal. In the case of Georges Codere (12 Cr. App. R., 1916) it was definitely laid down by the Court that the meaning of the word " wrong " should not be judged by the standard of the accused, " which would tend to weaken the law to an alarming degree. . . . It is conceded now that the standard to be

applied is whether according to the ordinary standard adopted by reasonable men the act was right or wrong."

In R. *v.* Pank (*Times*, May 22, 1919) Mr. Justice Darling followed the ruling in R. *v.* Codere when he addressed the jury: "If he knew that his act would be wrong in ordinary circumstances it is no defence that he thought that the special circumstances present in this particular case would render it justifiable in him to do the act."

We venture to say that one of the most lucid directions to a jury with reference to the present law concerning crime and insanity was given by the Lord Chief Justice in R. *v.* Percy Charles Anderson (Sussex Winter Assize, *Times*, March 9, 1935). In this case the prisoner was indicted for the murder of Edith Constance Drew-Bear,[21] whose body, with three bullets in it and a scarf tied tightly round the neck, was found in a water-tank on the East Brighton Golf Course on Nov. 25, 1934.

In the course of his summing up Lord Hewart said:—

"What is the law with regard to crime and insanity? The foundation of the whole matter, the very root of it which is vital to all citizens in all civilized communities is a proposition which has not yet been offered [by the defence].

"It is the real foundation of the law relating to insanity: 'Every man is presumed to be sane and to possess a sufficient degree of reason to be

responsible for his crimes until the contrary is proved to the satisfaction of the jury. . . . To establish a defence on the ground of insanity it must be clearly proved—not suggested—that will not do ; it must be clearly proved that at the time of committing of the act the party accused was labouring under'—what ? Now every word of this is of first-rate importance—'under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing or'—observe the word is not 'and' but 'or'—'that he did know it, but did not know that what he was doing was wrong.'

"That being so, what is the burden upon the defence, where such a defence is raised ? You observe that the burden is on the defence. The Crown starts with the presumption that every man is sane.

"There are three things which must be clearly proved—not faintly or rhetorically suggested. First it must be clearly proved that at the time of the committing of the act the accused person was suffering from disease of the mind. That is stile Number One.

"Secondly, it must be clearly proved that because of that matter, and not because of something else, he was then labouring under a defect of reason. That is stile Number Two.

"There comes the choice of stiles. He need not get over both of them, but he must get over one or the other. It must be clearly shown that,

because of that disease of the mind resulting in infirmity of reason, either he did not know the nature and quality of his act or, if he did, he did not know that what he was doing was wrong.

" I wish you to have these points in your minds to-day.

" This case does not begin to be established on the part of the defence until you are satisfied by clear proof, not by vague suggestion, that at the time this act was done, if you believe that this man did it, his mind was diseased, his reason was consequently defective, and therefore, and not otherwise, either he did not know what he was about, or, if he did, he did not know what he was doing was wrong."

The prisoner was found guilty (*see also* p. 120). The prisoner appealed, and appeal was dismissed by the Court of Criminal Appeal (*Times*, March 30, 1935).

Mr. Justice Avory, in giving the judgment of the Court, said : " That they could not shut their eyes to the fact that the kind of defence which was raised in the present case had become almost common form in cases of crimes of violence. . . . The Court were also satisfied that the law with regard to the plea of insanity was properly put to the jury by the Lord Chief Justice, and that there was no evidence which would have justified the jury in accepting that plea as an answer to the charge."

Anderson was executed at Wandsworth Prison

on April 16, 1935. Prior to, and during, the execution there was a campaign against the death penalty conducted in the neighbourhood of the prison.

The jury subsequently made the unusual request to view the scaffold, and were allowed to do so (*Times*, April 17, 1935).

Delusions.—The criticisms arising out of the word " delusion " are of special importance. Delusions may be defined as false beliefs which persist after their falsity has been demonstrated. Some persons appear to regard delusions as essential symptoms of insanity, which is far from being the case, although many individuals suffering from insane disorder of the mind are the subjects of delusions.

At the time of the formulation of what has become known as the McNaghten Rule modern psychiatry was in its infancy, and it was quite excusable for laymen to imagine that the existence of a specific delusion might only affect the conduct of the individual concerned in so far as any act performed or omission made by that individual had some obvious relation to this delusion.

This supposal will not hold ground at the present time, and even as far back as 1883 the fallacy of a partitioned mind was indicated by Stephen,[25] who wrote : " It must also be remembered in estimating the importance of delusions and the probability of their being connected with acts which to a sane mind seem to stand in no relation at all to them,

that the mental processes of an unsound mind are as often distorted as much as the conclusions connected with them are vitiated; . . . there may be a connection between the delusion and the crime insane as the delusion itself." The author then supports this proposition by referring to the following case :—

"A man had some insane delusions about windmills, and would spend hours in watching them. His friends kept him out of the way of windmills in order to cure him of his delusions. He mutilated and nearly killed a little girl. There is no apparent connection between the delusion and the act, but there was a connection in his mind. He thought that if he committed a crime he might as a punishment be confined in some place where he could pass all his time in watching windmills."

We have already endeavoured to show that mind is indivisible, and this being so any slight mental disorder may affect the whole behaviour of the subject of this disorder.

Dr. John Warnock, a psychopathologist and formerly Director of the Lunacy Division of the Ministry of the Interior, Cairo, holds very definite views regarding this subject, and a leading article in a medical journal[41] refers to these views.

In common with nearly all modern psychopathologists Dr. Warnock contends that the theory of partial or limited insanity is untenable, and that the mind functions as a whole and is disturbed as a whole. For example, a delusion is not merely

a disorder of intellect, but is the expression of affective and conative disturbances as well; it is the outward sign of a mental disorder which impairs the functions of the mind generally, just as in scarlet fever the spots are of little importance compared with the pathological processes going on in the organism as a whole.

Is is thus impossible to declare that any act of a lunatic may not be related to his insanity, or that his appreciation of right and wrong may not have been affected.

Sydney Smith[42] writes: "His intellect may be affected in only one detail, producing but a single delusion, and as far as can be judged leaving him quite normal in all other beliefs. . . . It is nevertheless to be remembered that though we can find no other alteration from the normal, it is very undesirable in the present state of knowledge to assume that the person is otherwise normal. No one can tell whether the underlying mental processes which give rise to one fault in feelings or intellect may not insensibly warp the feelings and judgment in others, leading to acts which apparently have no connection with the delusion or other disordered condition, but which really are the outcome of such morbid processes."

The writings of Charles Mercier[15] deserve careful notice. He divides mind into faculties and considers that disorder may exist in only one such faculty. He writes: "In practice we find that any one of these faculties may alone be subject to

disorder, the others remaining normal, or with only such errors in action as are strictly consequential to the disorder of their erring colleague." Even this strong advocate of a partitioned mind goes as far as to admit that other faculties may, in certain cases, be affected by an erring colleague. We submit that no one can say with certainty whether an error in faculty A is, or is not, " strictly consequential " to an error in faculty B.

Further, in another of this author's text-books[16] his views are somewhat modified. Thus he writes, referring to mental disorder : " It may be so limited as, in the field of judgment or belief, to produce but a single delusion, leaving the power of judgment as to other beliefs apparently unaffected." The inclusion of the word " apparently " speaks for itself !

As far back as 1848 Lord Brougham showed that he was far ahead of the times, since in Waring *v.* Waring, 1848 (6 Moo.P.C., 341), he remarked : " We must keep always in view that which the inaccuracy of ordinary language inclines us to forget ; that mind is one and indivisible. We cannot, therefore, in any correctness of language, speak of general and partial insanity. If the being or essence which we term the mind is unsound on one subject, provided that unsoundness is at all times existing upon that subject, it is quite erroneous to suppose such a mind really sound upon other subjects. It is only sound in appearance."

At a much later date, in the Court of Criminal Appeal a similar view was expressed by one of the members of the Court. In the case of Tom Gilbert (1914, 11 Cr. App. R.) the appellant, who was the subject of delusions, asked leave to appeal against conviction and sentence of death for murder.

Per Horridge, J. : " Two defences appear to me to have been possible : (1) That the delusion was that he was committing the act in self-defence. (2) That delusions are evidence of general insanity. I think that there was medical evidence in support of both defences." (Sentence quashed and special verdict substituted.)

CHAPTER VII

SIGNIFICANCE OF THE McNAGHTEN RULE

The celebrated "answers" by the judges have been analysed and criticized by numerous writers, both legal and medical, and it may be profitable to refer to these criticisms.

It has been suggested by Stroud[2] that: "In point of law, answers given by judges, however formally, to questions propounded to them, whether by the King or by either House of Parliament, possess no binding authority whatever. They are opinions, not judgments. The chief value in these answers lies in the fact that, by a full and correct statement of the main doctrine of responsibility, as settled by authoritative decisions prior to 1843, they have afforded a solid basis for the recognition and enforcement of that doctrine and its adaptation to modern social conditions.

"All the useful results of ancient learning being gathered together in these considered pronouncements, it has been rendered unnecessary for the modern lawyer to collect his first principles from the criminal trials of semi-barbarous times."

Such views as this admittedly require some modification, for, owing to frequent references to

the McNaghten Rule by judges in the course of their addresses to juries, the rule has become incorporated in the common law. Since many of the directions to juries before 1843 were on the lines of the McNaghten Rule it is clear that this rule was no innovation in criminal law. A notable example of such a direction is that in the case of R. *v.* Oxford (1840) (9 C. & P., p. 525) (*see also* p. 83 *above*).

That the McNaghten Rule is capable of a wide interpretation is quite obvious if we consider the remarks made by Lord Chief Justice Tindal in delivering the " answers " to the House of Lords (10 Cl. & F., 200) : " The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case. As it is their duty to declare the law upon each particular case on facts proved before them, and after hearing argument of counsel thereon, they deem it at once impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your lordships' questions."

It has been frequently observed that history repeats itself, and at a much later date (1909) Mr. Justice Darling, in delivering the judgment of the Court of Criminal Appeal in R. *v.* Meade, said (2 Cr. App. R., 1909) : " But it is necessary to repeat what has often been said before in this Court, namely, that when a judge sums up to a jury he

must not be taken to be inditing a treatise on the law. He addresses himself to the particular facts of the case then before the jury, and no judge can affect, in those circumstances, to give an exhaustive definition, or one which applies to every conceivable case."

Kenny[29] considers that the test of insanity based upon the presence or absence of the faculty of distinguishing right from wrong has acquired a degree of authoritative precision unusual for any common law doctrine, through its formulation in an abstract shape, in 1843, by a set of answers delivered by the judges in reply to questions propounded to them by the House of Lords.

We agree with Kenny that the McNaghten Rule is nothing more than a rule of common law, which, however, has been of immense assistance to judges in giving them a sound basis for their summings up, and we submit in no way restricting their right of virtually extending the common law if any special circumstance indicates the necessity for so doing.

We think that any statutory interference with this judicial privilege would be most detrimental to the furtherance of justice in criminal medico-legal cases.

Kenny makes some very important remarks on the McNaghten Rule in his text-book above referred to,[29] and it may be useful to reproduce them here :—

" The questions put to the judges had reference, as we have seen, only to the effect of insane delusions

and insane ignorance. But insanity affects not only men's beliefs, but also, and indeed more frequently, their emotions and their wills. Hence since 1843 much discussion has taken place as to the effect of these latter forms of insanity in conferring immunity from criminal responsibility. The result has been that though the doctrines laid down after McNaghten's trial remain theoretically unaltered, the practical administration of them affords a wider immunity than their language would at first sight seem to recognize.

"For many forms of insanity which do not in themselves constitute those particular defects of reason which the judges recognized as conferring exemption from responsibility are now habitually treated as being sufficient evidence to show that one or other of those exemptive defects are also actually present."

These reasonable conclusions so ably set forth by a distinguished lawyer make it quite clear that in appropriate cases it is the duty of counsel to show to the satisfaction of the Court and the jury that certain alleged symptoms of insane mental disorder do, or do not, directly or indirectly bring a defendant within the McNaghten Rule.

The question for the jury is whether a defendant exhibiting certain symptoms is likely at the time of an act to know its nature and quality, its rightness or wrongness, and whether or no he did so understand. In support of this view we quote the following cases heard by judges in Courts of first instances,

and also judgments from the Court of Criminal Appeal.

As far back as 1849 at Oxford Summer Assizes, Baron Rolfe said in R. *v.* Layton (4 Cox 149, 1849): "... he, the prisoner, was not exempt from responsibility because he was labouring under a delusion as to his property unless that had the effect of making him incapable of understanding the wickedness of murdering his wife. But when that was the question they had to consider, he could not say that it was altogether immaterial that he was insane on one point only. Indeed, his insanity on that point might guide them to a conclusion as to his insanity on the point involved in this case."

As we have previously pointed out, this view of the indivisibility of mind receives strong support from many authorities.

In R. *v.* Law (1862) (2 F. & F., p. 836), a case where a poor woman suffering from the effects of childbirth, killed her husband and child, Erle, C. J., in summing up said: "There was a morbid action of the brain; there was a state of disease resulting from childbirth; and other causes which might lead to insanity; and there were before the act in question delusions of the senses, which medical men consider, and might well consider, symptoms of insanity. She seems to have fancied she saw and heard devils, even when no one was in the house alive but herself. ... It is for you to say whether upon such evidence you consider she was in such a

state as to know the nature of her actions, and to be aware that she was committing a crime."

Before proceeding to quote from judgments delivered in the Court of Criminal Appeal it should be noticed that this Court quite definitely associates the legal conception of insanity with that type of insanity—or those symptoms of insanity—which appear to come within the McNaghten Rule. This Court has never yet made any attempt to interpret this rule in such a way that would render it impossible for a jury to use its common law privilege of deciding, as a matter of fact, whether any manifestation of insanity in a defendant does or does not bring that defendant directly or indirectly within the McNaghten Rule.

The two following cases refer to rulings of the Court of Criminal Appeal regarding the legal definition of insanity. In R. *v.* James Macdonald (1 Cr. App. R., 1908, pp. 262–6) Mr. Justice Darling referred to the legal definition of insanity, and made it clear that the onus of proving this type of insanity was on the defence, but stated that although the appeal could not be allowed, the case might properly be referred to the Home Secretary.

What exactly constitutes insanity from the legal point of view was made quite clear by the same learned judge, Mr. Justice Darling, in R. *v.* John William Smith (5 Cr. App. R., 1910). "The law on this matter is perfectly well known, and we have merely to administer it. . . . The question is whether this man was prevented by disease of the

mind from knowing the nature and quality of the act he was doing, and further was he capable or not of knowing whether it was right or wrong. If he were incapable of knowing whether the act he did was right or wrong, then he comes within McNaghten's Case."

Nevertheless, the remarks of the Lord Chief Justice in the case of James Overend Marsland (7 Cr. App. R., 1911, p. 77) cannot be disregarded, and they justify the greater latitude in summing up adopted by some judges. In delivering the judgment of the Court in this case the Lord Chief Justice said: "There is no question as to there having been insufficient or improper direction on the principles which should guide the jury, and I cannot agree that the summing up shewed any disapproval of the application to this case of the question of insanity as defined in McNaghten's Case; it would not have been misdirection if there had been (p. 80); the judge is bound to let his views be known."

The following cases would seem to support the contention that it is always a question of fact for the jury whether or not any symptom of insanity brings a defendant within the McNaghten Rule.

In the case of Tom Gilbert, previously quoted under the question of delusions and reported in 11 Cr. App. R. (1914), per Horridge, J.: "Two defences appear to me to have been possible: (1) that the delusion was that he was committing

the act in self-defence, (2) that delusions are evidence of general insanity. I think that there was medical evidence in support of both defences."

In the case of Frederick Rothwell Holt (15 Cr. App. R., 1920) it was reported that Mr. Justice Greer had left the question of uncontrollable impulse to the jury, but in a subsequent case heard in the Court of Criminal Appeal, that of Ronald True (16 Cr. App. R., 1922, p. 164), Mr. Justice Greer said with reference to the case of F. R. Holt: "I am not quite accurately reported there. What I really told the jury was that the definition of insanity in criminal cases was the one laid down by the judges in McNaghten's Case, but that men's minds were not divided into separate compartments, and that if a man's will power was destroyed by mental disease it might well be that the disease would so affect his mental powers as to destroy his power of knowing what he was doing, or of knowing that it was wrong. Uncontrollable impulse in this event would bring the case within the rule laid down in McNaghten's Case."

We submit that, since in all criminal trials the decision of the jury must depend upon their interpretation of the evidence before them, they might well consider the contention of an advocate that, since mind is indivisible, a prisoner shown to their satisfaction to exhibit any symptom of insanity, such as the possession of a delusion or uncontrollable impulse, could never, in the strictest sense of the words, really fully comprehend the nature and

quality of an act—still less its rightness or wrongness.

We conclude this section with an extract from a lecture given by Lord Hewart[43] to the Medical Society of London on Nov. 16, 1927 :—

" After all," continued Lord Hewart, " the mere fact that a man thinks he is John the Baptist does not entitle him to shoot his mother. And if a man of abnormally jealous disposition entertains suspicions as to the chastity of his wife, and his suspicions become what it is fashionable to call an 'obsession', and finally a fixed delusion, is he to kill her by poisoning, having done all he could to conceal the crime ? It seems true to say that in cases where there is evidence of real mental disease, antecedent to the commission of the alleged crime, and there is no evidence of a motive which might influence a sane person, juries have no difficulty in finding either that the prisoner did not appreciate the nature of his act, or that he did not know that it was wrong."

CHAPTER VIII

ADVOCACY IN CASES INVOLVING MENTAL DISABILITY

In connection with criminal trials it is quite common for the accused person to put forward the plea that at the time of the act charged he was under some mental disability, or that at some previous time he had suffered from some form of nervous or mental disease, and an attempt is frequently made to support such a plea by producing evidence that this condition was brought about by some accident or injury, generally to the head.

It is beyond all doubt that in some of these cases the allegations made by the defendant are absolutely true, and we are personally aware of the genuine nature of a number of such pleas.

It therefore becomes necessary in every case of alleged or suspected mental disability that the accused person should be examined by experts on the lines we have already indicated, and that there should be conferences between advocates and medical witnesses. It is quite natural that judges should regard such cases with suspicion until they have evidence before them that the alleged disability is not fictitious. We must also bear in mind that an essential point in connection with the plea

of insanity in criminal charges is the mental condition of the accused person at the time of the commission of the act.

If it has been established that at some previous time the prisoner has been liable to attacks of temporary mental confusion, or is the subject of some disease which may be associated with such temporary confusion of the mind, then it is always a question of fact for the jury whether at the critical time he was in such a confused mental condition that he was unaware of the nature and quality of the act, or incapable of forming a specific intent.

We have endeavoured to show that the McNaghten Rule is actually a much wider rule than it appears to be at first sight; it does not lay down any definition for insanity, but simply prescribes those manifestations of mental disorder which exempt an offender from criminal responsibility.

It is quite clear that if an advocate seeks to bring his client within the rule, and the jury find that the accused does come within the rule, it is incumbent upon the presiding judge to treat the prisoner in one way only, and commit him to a criminal lunatic asylum in conformity with Sect. 2 (2) of the Trial of Lunatics Act 1883, 46 & 47 Vict. c. 38.

It is appropriate here to refer to a ruling of the Court of Criminal Appeal concerning the duty of counsel for the Crown with regard to tendering evidence of a prisoner's sanity. In the case of

Oliver Smith (6 Cr. App. R. 19, 1910) the Lord Chief Justice said : " The question came up seven or eight years ago, when a practice arose of the Crown calling the prison doctor to prove insanity. All the judges met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him if he thought fit."

It will be most convenient to divide cases into those involving a capital felony, and those involving a lesser crime.

CAPITAL FELONIES

Although in English law there are still several capital felonies, we propose to deal here only with that of murder, as in the rare event of one of the other capital felonies being perpetrated the defence would be conducted on similar lines.

In all probability the views of our judges concerning the McNaghten Rule are divided, and it is likely that some of them would consider that they are not bound to comply absolutely with the apparently rigid requirements of this rule in their summings up ; indeed, there may well be differences of opinion as to what constitutes absolute compliance with the rule.

This point is really immaterial, and it may be wise for advocates to consider the rule as an absolute rule of law ; there can, however, be no doubt

that in every case it is a question of fact for the jury whether or not an accused person's medical history is one that renders him liable to have periods of complete mental confusion, and thus to come within the rule, the jury basing their verdict on the facts of the case as brought out by witnesses, especially medical witnesses, aided by the direction of the presiding judge.

If we accept this reasonable view it becomes quite clear that all persons who have at any time suffered from any form of insane mental disorder but who apparently do not come within the McNaghten Rule may fairly and quite honestly be found by a jury to be "Guilty but insane", should these unfortunate people bring themselves into conflict with the criminal law.

This view was clearly held by Baron Rolfe, who in R. *v.* Layton (1849) (*see* p. 110) in the course of his summing up said: "Indeed, his insanity on that point might guide them to a conclusion as to his insanity on the point involved in the case." *See also* the remarks of Mr. Justice Greer in the case of R. *v.* Holt (15 Cr. App. R., 1920) and p. 113 *above*.

It need hardly be said that the jury may ignore the evidence of a medical witness if circumstances appear to warrant this, and that they alone can decide as to the prisoner's condition at the time of the act. In many cases the symptoms of insanity exhibited by an accused person may be so obvious as to cause no difficulty in satisfying the jury as to the condition, but we must bear in mind that

conditions other than those generally recognized as constituting insanity may directly bring a person within the McNaghten Rule, or indirectly render him likely to come within this rule.

It is incumbent for an advocate to remember that a judge is not bound in law to put to the jury any particular defence set up if he thinks that the facts proved do not in law make out that defence. This was decided in the case of James Honeyands (10 Cr. App. R., 1914) in which the defence was insanity and the counsel for appellant criticized the summing up of the commissioner who tried the case. Per Lord Chief Justice : " A judge who is trying a case of this kind is not bound in law to put a particular defence to the jury if he takes the view that that defence has not been made out, and that the facts do not amount in law to proof of the defence which is suggested."

Those Conditions not Generally Recognized as Insanity.—

1. We have already stated our opinion that acute inebriation is a form of acute insanity, this opinion being based on scientific grounds, and also strongly supported by certain judicial dicta, if reasonably interpreted.

2. To this class belong the temporary insanities which have been described as associated with certain acute infections. They are definitely of precisely the same nature as what has been unscientifically termed " actual insanity ".

3. Those temporary and usually brief periods of

mental confusion which, as previously stated, may be exhibited by persons suffering from high blood-pressure (hyperpiesis).

Although we submit that the above and other conditions previously mentioned may bring an accused person within the McNaghten Rule if he should commit a crime while actually suffering from the condition alleged, it does not of necessity follow that it would be wise for an advocate to bring forward the plea of insanity if called upon to defend such an individual. It is a grave responsibility for counsel to decide whether it is preferable to use every endeavour to secure a verdict of " Guilty but insane " or rely on pleading absence of capacity to form intent.

In the case of R. *v.* Anderson previously referred to, Lord Hewart in his summing up said : " Then I would ask you to consider this, whether it is better that a guilty man, if he be guilty, should be punished, or that a sane man, on a false allegation of insanity, should be detained for a long time in a criminal lunatic asylum ? "

It should be remembered that Sections 4 and 5 of the Criminal Lunatics Act 1884 protect a criminal lunatic from the possibility of life-long incarceration after his recovery. This point was referred to by Mr. Justice Darling in the Court of Criminal Appeal in the case of Albert William Ireland (1910) (4 Cr. App. R., p. 87). The learned judge said : " There is no ground for the assertion that the appellant might be kept in an asylum for the

remainder of his life, as he can always be discharged when it is safe to do so."

It would, moreover, seem very undesirable to put up a plea of insanity in the case of an accused person who had committed homicide whilst suffering from an attack of mental confusion brought about by hyperpiesis or an acute infection ; in such a case most lawyers will probably agree that it would be wiser to plead lack of power to form a specific intent, and thus endeavour to obtain a verdict of manslaughter, and rely on the wisdom and clemency of the presiding judge to protect the unfortunate individual.

NON-CAPITAL FELONIES

In considering non-capital felonies it must be remembered that should insanity be successfully pleaded only one verdict and sentence is possible ; the presiding judge has no alternative but to send the prisoner to a criminal lunatic asylum, which may be very undesirable from the point of view of the accused and his relatives. As to the possible duration of such a sentence, *see* the remarks of Darling, J., in the case of Arthur William Ireland (p. 120).

It must be borne in mind that even in cases where evidence of certain types of mental disorder is not likely to induce a jury to find a verdict of " Guilty but insane " it may enable them to find a verdict for a lesser crime, or influence the judge in regard to

the severity of the sentence he passes in the event of the accused person being found guilty of the offence charged, or of a lesser one.

For these reasons every endeavour should be made to ascertain from medical examination, and from the history of a defendant obtained from his friends, whether he has at any time prior to the offence charged been subject to periods of various degrees of mental confusion; if this should be established, an attempt must be made to discover the probable cause of these temporary lapses from normal mentality.

It must be quite clear to any intelligent person that there are different degrees of mental confusion, varying from mere stupidity to what almost amounts to oblivion. If this be accepted it follows that a person, during a period of mental confusion, may quite well know the nature and quality of an act, and even vaguely realize that the act is wrong, but at the same time be incapable of carrying out the act in question with a specific intention.

If we examine some of the common law rules and statutory enactments which enable a jury to find a person guilty of an offence of less gravity than the one with which he is charged, we must realize that an advocate when defending an accused person may have many opportunities of helping his client if any evidence of mental derangement at the time of the act done or omission made can be produced.

Stroud[2] deals in an interesting way with the condition of drunkenness as modifying the charge in

burglary and other crimes involving specific intent, and the same results may follow when any other cause for mental disorder can be proved.*

Numerous statutory enactments which we have referred to elsewhere enable a defendant to be convicted of an offence involving a less degree of criminal intention than the one charged, and also at common law alternative verdicts are possible in many cases. This possibility is dealt with in Archbold (p. 208 et seq.) and a few examples are given here. Thus at common law a person may be convicted of a less serious felony or misdemeanour than the one with which he is charged if the indictment contains words apt to include both offences. It is not uncommon for a prisoner indicted for murder to be found guilty of manslaughter. On a charge of robbery, if the property is taken without violence or " putting in fear ", defendant may be found guilty of larceny.

A very important example of the common law possibility of an alternative verdict is that a prisoner may be convicted of a common assault upon an indictment charging him in the first count with unlawfully and maliciously wounding, and in the second count with unlawfully and maliciously inflicting grievous bodily harm, although the word " assault " is not used in the indictment. (R. *v.* Taylor, 1869, L.R. 1 C.C.R., 194).

It is clear that a person who commits a criminal

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* *See also* Inebriates Act (1908), sect. 1.

offence exhibits not only a criminal *mens rea*, but with this is also associated some degree of moral guilt. This fact is of importance from an advocate's point of view ; in the first place the degree of moral *mens rea* will largely depend upon the mentality of the offender, and in the second place the severity of punishment may depend upon this degree of moral guiltiness, so that it may be possible to help an accused person by a careful consideration of any factors affecting mentality.

This possibility has doubtless been recognized by our legislature which gives such wide discretionary powers regarding punishment to judges and magistrates, and which has done good service to people of low intellectual powers by the introduction of the Mental Deficiency Act (1913). In our criminal courts it is not uncommon so see men who have made uncalled-for assaults upon their wives or others, and when charged it is frequently found that hitherto they have been most desirable people, but have gradually developed irritability of temper ; an examination of their medical history has often revealed a change in character, sometimes accompanied by an increase in blood-pressure. In such cases it may be the duty of a jury to decide on the facts of the case whether at the time of the assault the prisoner was capable of forming a specific intent, e.g., to inflict grievous bodily harm ; the decision of the jury must of necessity depend very largely on the examination of medical witnesses and relatives.

In concluding this section we suggest that advocates who undertake to defend persons charged with criminal offences should hesitate before they decide to avail themselves of the possibility or even probability that their client suffers or has suffered from some form of mental disability.

There are good reasons for advising such hesitation ; as we have previously remarked, judges are apt to regard with suspicion the plea that an accused person has at some time in his life been " queer ", or has suffered from head injuries, etc. It must furthermore be conceded that the criminal classes, taken collectively, are below the normal standard of mentality. If, however, there are reasonable grounds for supposing that some mental disability exists, advantage should be taken of such disability even if only to secure some mitigation of punishment.

There is one class of offender occasionally met with, and previously referred to, where medical evidence may be of great value ; this class consists of elderly men whose lives have hitherto been unblemished, but who unexpectedly become the subjects of a criminal charge by reason of the allegation that they have behaved indecently in various ways.

If such cases are wisely defended it may be possible to obtain for these unfortunate people appropriate treatment in a medical institution, rather than unmerited detention in a penal establishment.

APPENDIX

SOME IMPORTANT STATUTORY ENACTMENTS RELATING TO MENTAL STATES

It is interesting to notice the growth of the statutory recognition of mental states in relation to the law of the land.

In Roman law as far back as the time of the Twelve Tables it was realized that an insane person was incapable of managing his affairs, and in Table V provision was made for the appointment of curators to act for such unfortunate persons. "*Si furiosus escit, adgnatum gentiliumque in eo pecuniaque ejus potestas esto.*"

In English law, according to Potter,[44] in the Dooms of Cnut it was decreed that an infant in a house where stolen property was found should not be held liable as if he had discretion; and although the laws of Henry I say "*qui peccat inscienter, scienter emendat*", yet they made provision that the infant and lunatic should not be liable.

If we examine certain statutory enactments we shall find that the legislature may lay great stress on the mental state of an offender, and recognize that a capacity to form full intention must be proved before any person can be held responsible for any illegal acts which he may commit. This is fully

in keeping with the ancient maxim " *actus non reum facit nisi mens sit rea* ", which the framers of our statute law have borrowed from the common law.

When we consider the actual wording of the older statutes we find some variation in the mode of expressing that it is essential to associate with the act charged a definite mental state on the part of the actor. One of the earlier statutes in which reference is made to mental states is the Treason Act (1351) 25 Ed. 3 : c. 2, section 5, contains the following words : " The King, at the request of the lords and commons, hath made a declaration in the manner as hereafter followeth, that is to say ; when a man doth compass or imagine the death of our lord the King".

A statute concerning forcible entry—namely, 8 H. 6, c. 9 (1429)—contains the words : " to the intent to delay and defraud such rightful possessors of their right and recovery for ever ".

Stephen[22] mentions a statute which we have referred to elsewhere—namely, 23 H. 8, c. 1 (1531), which removes benefit of clergy from those who have been guilty of murder with " malice prepense ". Another interesting statute, 33 H. 8, c. 8 (1541), aims at those who practise witchcraft " with evil intent ".

The Treason Act (1796) 36 G. 3, c. 7, uses more definite language than the Act of 1351 with reference to the mental state of the persons concerned in any plot against the King : " If any person or persons whatsoever . . . shall within the realm or without,

compass, imagine, invent, devise, or intend death or destruction . . . ".

Early in the nineteenth century a statute was passed which was a forerunner of numerous later statutes using the words " with intent to " (43 Geo. 3, c. 58).[45] " An act for the further prevention of malicious shooting . . . either with an intent to murder . . . etc." This statute is of some interest, since one case in which the prisoner was indicted under it—namely, R. *v.* Farrington (R. & R. 207, 1811)—is frequently referred to. In this case it was held by the judges that a party necessarily intended the consequences of his act.

In 1828 an Act was passed for consolidating and amending the statutes in England relating to offences against the person (9 Geo. 4, c. 31). This Act contains the words " striking with any weapon, or drawing any weapon with intent to strike ".

Following these earlier enactments a statute was passed, which, although it makes no express reference to mental states, recognizes that in certain assaults there may be different degrees of criminal intentionality. (*See* Prevention of Offences Act (1851), 14 & 15 Vict., c. 19, s. 5, *below*).

It is a significant fact that soon after the date of McNaghten's Case it became usual to include the words " with intent " in statutes relating to criminal offences. Thus in 1861 a number of statutory enactments were passed containing these words in connection with offences against the person, coining, larceny, etc.

All these statutes are of importance, since it may be possible for an advocate to bring evidence to rebut the special intent. It is, however, probable that those statutory enactments which allow a jury to find an alternative verdict are of still greater importance, from an advocate's point of view, as in a considerable number of cases the alternative verdict clearly shows that the jury consider the prisoner to be guilty of a lesser crime than the one set forth in the indictment. One of the earliest of such enactments was passed in 1851 and reads as follows: The Prevention of Offences Act (1851) 14 & 15 Vict., c. 19, s. 5. "If, upon the trial of any indictment for any felony, except murder or manslaughter where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanour of cutting, stabbing, or wounding." (Not so in cases of felonious shooting. R. *v.* Miller, 14 Cox, 356.)

This enactment is still in force, and enables a defendant charged under section 18 of the Offences

against the Person Act (1861) 24 & 25 Vict., c. 100, with wounding with intent to inflict grievous bodily harm, etc., to be found guilty of unlawful wounding. (*See also* under ADVOCACY, rule in R. *v.* Taylor, 1869, L.R. 1 C.C.R. 194.) Certain sections of the Offences against the Person Act (1861) also recognize that persons who administer poisons for an unlawful purpose may exhibit different degrees of criminal *mens rea*, thus by s. 23 every one is guilty of a felony, and is liable upon conviction to ten years' penal servitude, who unlawfully and maliciously administers to or causes to be administered to, or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm.

By s. 24 everyone commits a misdemeanour who unlawfully and maliciously administers, or causes to be administered to or taken by any other person, any poison or other destructive or noxious thing with intent to injure, aggrieve, or annoy such person. (Maximum imprisonment, five years' penal servitude.)

By s. 25. If, upon the trial of any person for any felony in the last but one preceding section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any misdemeanour in the last preceding section mentioned, then and in every such case the jury may acquit the accused of such felony,

and find him guilty of such misdemeanour, and thereupon he shall be liable to be punished in the same manner as if convicted upon an indictment for such misdemeanour.

Section 60 of the same act is noteworthy in that it is to some extent a forerunner of the Infanticide Act (1922) (q. v.). The last part of this section enacts that: "Provided that if any person tried for the murder of any child shall be acquitted thereof, it shall be lawful for the jury by whose verdict such person shall be acquitted, to find, in case it shall so appear in evidence, that the child had recently been born, and that such person did, by some secret disposition of the dead body of such child, endeavour to conceal the birth thereof; and thereupon the Court may pass such sentence as if such person had been convicted upon an indictment for the concealment of the birth." (Maximum imprisonment, two years).

In the case of persons charged with certain sexual offences it is possible for a jury to convict of a lesser offence than that charge. This may be of extreme importance in the defence of a person of low mentality, or who was proved to be under the influence of drink at the time of the offence.

By the Criminal Law Amendment Act (1885) 48 & 49 Vict. c. 69, s. 9: "If upon the trial of any indictment for rape, or any offence made felony by s. 4 of this Act, the jury shall be satisfied that the defendant is guilty of an offence under s.s. 3, 4, or 5 of this Act, or of an indecent assault, but are not

satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then, and in every such case the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid, or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted for such offence aforesaid, or for the misdemeanour of indecent assault."

Provision is made in the Punishment of Incest Act 1908, 8 Edw. 7, c. 45, s. 4 (3), whereby a person indicted for an offence under this Act may be found guilty of an offence differing from incest, and possibly less serious. The relevant part of s. 4 reads as follows: "If on the trial of any indictment for an offence under this Act the jury are satisfied that the defendant is guilty of any offence under s.s. 4 or 5 of the Criminal Law Amendment Act 1885, but are not satisfied that the defendant is guilty of an offence under this Act, the jury may acquit the defendant of an offence under this Act and find him guilty of an offence under s.s. 4 or 5 of the Criminal Law Amendment Act 1885 and he shall be punished accordingly."

In R. *v.* Simmonite, 1916 (12 Cr. App. R., 142), it was held that a person indicted for incest could be convicted of indecent assault.

It should be observed that the crimes referred to in sections 3, 4, and 5 of the Criminal Law Amendment Act 1885 refer to offences against females. Section 3 deals chiefly with procuration and

prescribes a penalty of imprisonment not exceeding two years. Section 4 deals chiefly with unlawful carnal knowledge of girls under thirteen years of age and prescribes a penalty which may be as severe as penal servitude for life. Section 5 deals with a like offence against girls between thirteen and sixteen years of age and prescribes a maximum penalty of two years' imprisonment.

ENACTMENTS RELATING TO PERSONS WHO MAY ADMITTEDLY HAVE SOME DEGREE OF MENTAL DISABILITY

The Inebriates Act 1898 (61 & 62 Vict., c. 60, s. 1) permits detention in an inebriate reformatory to be substituted for imprisonment in certain cases (Archbold, p. 1472).

The Probation of Offenders Act 1907 (7 Edw. 7, c. 17) gives wide powers to courts of summary jurisdiction. Section 1 paragraph (1) reads as follows: "Where any person is charged before a court of summary jurisdiction with any offence punishable by such court and the court thinks that the charge is proved, but is of opinion that having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence or the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment, or any other than a nominal punishment, or that it is expedient to allow the offender on probation, the

court may, without proceeding to conviction, make an order . . . ". Here follow a number of alternative proceedings which may be adopted, the most important being " dismissing the information or charge ". The other possibilities include discharging an offender and placing him under the supervision of a probation officer.

It need hardly be said that the discretion given to courts of summary jurisdiction to discharge an offender unconditionally in certain cases is a power which of necessity is very carefully exercised by magistrates ; it may nevertheless be most helpful to an advocate to remember this provision when defending a person who, for various reasons, may not have been in a normal mental state at the time of the act charged.

The Children's Act 1908 (8 Edw. 7, c. 67) recognized by its provisions the principle of law laid down by Mr. Justice Littledale in R. *v.* Owen (1830) (4. C. & P., p. 237) : " Whenever a person committing a felony is under fourteen years of age the presumption of law is that he or she has not sufficient capacity to know right from wrong, and such person ought not to be convicted unless there be evidence to satisfy the jury that the party at the time of the offence, had a guilty knowledge that he or she was doing wrong." This Act extended the above principle by providing that not only children but also young people shall be accorded special treatment in certain cases.

Section 131 defined a " child " as a person under

fourteen years of age, and a "young person" one who is fourteen years and upwards, and under the age of sixteen years. (*See* section 70, Children and Young Persons Act 1932, *below*).

Section 107 enumerated the various legal modes of dealing with children and young persons found guilty of offences, e.g. :—

1. By dismissing the charge.

2. By discharging the offender or in entering into a recognizance.

3. By discharging an offender and placing him under the supervision of a probation officer.

4. By committing the offender to the care of a relative or other fit person.

5. By sending the offender to an industrial school.

6. By sending the offender to a reformatory school.

7. By ordering the offender to be whipped.

8. By ordering the offender to pay a fine, damages, or costs.

9. By ordering the parent or guardian of the offender to pay a fine, damages, or costs.

10. By ordering the parent or guardian of the offender to give security for his good behaviour.

11. By committing the offender in custody to a special place of detention. (Section 107 not changed by subsequent Acts of 1932 and 1933.)

The Act also forbids penal servitude for a young person, and imprisonment for children, and abolishes the death sentence in the case of children and young people. (*See* 1932 Act.)

The Prevention of Crime Act 1908 (8. Edw. 7, c. 59)

This Act must be referred to as it recognizes the possibility that, by proper education under favourable surroundings, young people with criminal tendencies may become useful members of society.

It also recognizes the importance of the age factor in relation to mental development. Section 1 provides that :—

1. Where a person is convicted on indictment of an offence for which he is liable to be sentenced to penal servitude or imprisonment, and it appears to the Court

a. That the person is not less than sixteen, nor more than twenty-one years of age, and

b. That, by reason of his criminal habits or tendencies, or association with persons of bad character it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime ; it shall be lawful for the court, in lieu of passing a sentence of penal servitude or imprisonment, to pass a sentence of detention under penal discipline in a Borstal Institution.

The Criminal Justice Administration Acts 1914 and 1925 (4 & 5 Geo. 5, c. 58, and 15 & 16 Geo. 5, c. 86) under certain circumstances allow a court of summary jurisdiction in cases where a convicted

person appears to be not less than sixteen nor more than twenty-one years of age, to commit the person to prison until the next Assize or Quarter Sessions, with a view to the person being sent to a Borstal Institution by the superior Court.

The Mental Deficiency Act 1913 (3 & 4. Geo. 5, c. 28)

This enactment deals with those persons concerning whom there is definite medical evidence of imperfect mental development. Its avowed object is to make further and better provision for the care of feeble-minded and other mentally defective persons and to amend the Lunacy Acts.

Section 1.—Dealt with the definition and classification of defectives, and is replaced by section 1 of the 1927 Act.

Section 2.—Makes provision for dealing with defectives. The most important provision seems to be that a mental defective who is found guilty of any criminal act may be placed in an institution for defectives.

Section 8.—Provides that a Court, in lieu of passing sentence upon an offender, may order his detention under the Mental Deficiency Act. According to the eighteenth annual report of the Board of Control for the year 1931, 262 cases were dealt with during that year under this section. Of these, 18 were guilty of offences against the person, 6 of arson and stackfiring, 36 of warehouse breaking and

loitering with intent to commit felony, and 73 of sexual offences.

During the same period 43 cases were dealt with under section 9, which provides that, where an offender undergoing imprisonment is certified to be mentally defective, the Secretary of State may order his transfer from prison or other place of detention to an institution for defectives.

During the year 1932, 313 persons found guilty of criminal offences were dealt with as mental defectives; 89 per cent of these were dealt with by courts under section 8, and 11 per cent by the Secretary of State under section 9.

In 1933, out of a total of 278 such cases 91 per cent were dealt with under section 8, and 9 per cent under section 9.

The main provisions of sections 2 and 8 of the 1913 Act remain unchanged by the 1927 Act, and section 9 is not affected.

The Mental Deficiency Act 1927
(17 & 18 Geo. 5, c. 33)

This Act amends certain enactments relating to mental defectives.

1. (1) The following section shall be substituted for section one of the Mental Deficiency Act 1913.

1. (1) The following classes of persons who are mentally defective shall be deemed to be defectives within the meaning of this Act :—

(*a*) Idiots, that is to say, persons in whose case there exists mental defectiveness of such a degree that they are unable to guard themselves against common physical dangers.

(*b*) Imbeciles, that is to say, persons in whose case there exists mental defectiveness which though not amounting to idiocy is yet so pronounced that they are incapable of managing themselves or their affairs or, in the case of children, of being taught to do so.

(*c*) Feeble-minded persons, that is to say, persons in whose case there exists mental defectiveness which, though not amounting to imbecility, is yet so pronounced that they require care, supervision and control for their own protection or for the protection of others or, in the case of children, that they appear to be permanently incapable by reason of such defectiveness of receiving proper benefit from the instruction in ordinary schools.

(*d*) Moral defectives, that is to say, persons in whose case there exists mental defectiveness coupled with strongly vicious or criminal propensities, and who require care, supervision and control for the protection of others.

(2) For the purposes of this section 'mental defectiveness' means a condition of arrested or incomplete development of mind existing before the age of eighteen years, whether arising from inherent causes or induced by disease or injury.

There was no such proviso as to age in the 1913 Act. It is still possible to make use of the provisions of the Acts when defending an adult who may conform with one of the definitions of defectives set forth in the 1927 Act.

It was made clear in the case of Thomas Alexander (9 Cr. App. R., 1913) that mental deficiency does not necessarily entitle a jury to return a special verdict on the ground of insanity. Per Darling, J.: "In this case the appellant was found guilty of the murder of a woman with whom he lived, and the jury added a rider to their verdict strongly recommending him to mercy on the ground of his mental deficiency. They used those words after an explanation by the judge of what was the state of mind which would justify them in returning a special verdict on the ground of insanity. It is plain that the jury had evidence before them which justified them in finding that the appellant was not insane in the legal sense."

Infanticide Act 1922 (12 & 13 Geo. 5, c. 18)

From a medico-legal point of view this Act is very important. This Act may remove the stigma of the sentence of death being passed on a woman who has been found guilty of killing her infant child. The four paragraphs of section 1 read as follows:—

"(1) Where a woman by any wilful act or omission causes the death of her newly born child, but at the time of the act or omission she had not

fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed, she shall notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of such child.

"(2) Where upon the trial of a woman for the murder of her newly born child, the jury are of opinion that she by any wilful act or omission caused its death, but that at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, and that by reason thereof the balance of her mind was then disturbed, the jury may, notwithstanding that the circumstances were such that but for the provisions of this Act they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide.

[In R. *v.* O'Donoghue it was held that a child above a month was not "a newly born child" within the Infanticide Act 1922. (20 Cr. App. R., p. 132, 1927.)]

"(3) Nothing in this Act shall affect the power of the jury upon an indictment for the murder of a newly-born child to return a verdict of manslaughter, or a verdict of guilty but insane, or a verdict of concealment of birth, in pursuance of section 60 of the Offences against the Person Act 1861 (24 & 25 Vict., c. 100).

"(4) The said section 60 shall apply in the case of the acquittal of a woman upon indictment for infanticide as it applies upon the acquittal of a woman for murder, and upon the trial of any person over the age of sixteen for infanticide it shall be lawful for the jury, if they are satisfied that the accused is guilty of an offence under section 12 of the Children's Act 1908 (8 Edw. 7, c. 67) to find the accused guilty of such an offence, and in that case that section shall apply accordingly."

Section 12 of the Children's Act 1908 referred to above makes provision for the punishment of persons having the custody of children and young persons who have neglected, assaulted, or abandoned these children or young people, or have been guilty of other similar offences against them, and enacts (sub-section 3) that "a person may be convicted of an offence under this section, either on indictment or by a court of summary jurisdiction, notwithstanding the death of the child or young person in respect of whom the offence is committed."

Children and Young Persons Act 1932 (22 & 23 Geo. 5, c. 46).

This Act makes further and better provision for dealing with children and young people, and carries still further the principle laid down by Mr. Justice Littledale in R. *v.* Owen (*see above*). Parts of the Act have been repealed and re-enacted in a further

Act [1933] (*see below*). Hitherto a child under the age of seven years was at common law *doli incapax* by incontrovertible presumption of law—*praesumptio juris et de jure*. Section 19 of this Act raised this age to eight years, and also provided that sentence of death should not be pronounced or recorded against a person under the age of eighteen years (formerly sixteen years). The 1933 Act repeals this section, but re-enacts its provisions in sections 50 and 53.

Section 70 raises the age of "young persons" for the purposes of this Act and the Children's Act 1908.

"Young person" means a person who has attained the age of fourteen, and is under the age of seventeen years (formerly sixteen years), but for certain purposes relating to cruelty, etc., the age still remains fourteen to sixteen years. (Section 70 not changed by the 1933 Act.)

Children and Young Persons Act 1933 (23 Geo. 5, c. 12)

This Act contains 109 sections, in many of which it is recognized that children and young people exhibit a lesser degree of criminal intentionality than older persons. It is only possible to refer briefly to a few of these sections.

Section 31.—Provides that arrangements shall be made for the separation of children and young persons from adults in police stations, courts, etc.

Section 32.—Gives authority in certain cases to police officers of specified rank to release from apprehension persons apparently under the age of seventeen years, subject to a recognisance.

Section 33.—Gives authority to any court on remanding or committing for trial a child or young person who is not released on bail, to commit him to a remand home instead of to prison. The section contains a provision that the person so committed must not be so unruly or depraved that he cannot safely be so treated.

Sections 45–9.—Deal with matters connected with juvenile courts.

Section 50.—"It shall be conclusively presumed that no child under the age of eight years can be guilty of any offence."

Section 51.—"No conviction or finding of guilty of a child or young person shall be regarded as a conviction of felony or the purposes of any disqualification attaching to felony."

Section 52.—Makes restrictions on punishment of children and young persons, providing especially that they shall not be sent to penal servitude.

Section 53.—Deals with the punishment of certain grave crimes, and enacts that sentence of death shall not be pronounced on, or recorded against a person under the age of eighteen years.

Section 54.—Substitutes custody in remand homes for imprisonment in certain cases.

Section 55.—Gives power to courts to order parent or guardian to pay fines, damages, costs, etc., in certain cases.

Sections 56–59.—Contain various important provisions relating to juvenile offenders.

Section 99.—Deals with presumption and determination of age by courts of law.

SPECIAL ENACTMENTS RELATING TO "LUNATICS" OR "INSANE" PERSONS

Criminal Lunatics Act 1800 (39 & 40 Geo. 3, c. 94)

Section 1 empowered a petty jury to find a verdict of insanity upon the evidence. (*See* Trial of Lunatics Act 1883.)

Section 2 provides that " if any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment, it shall be lawful for the Court before whom any such person shall be brought to be arraigned as aforesaid, to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until his Majesty's pleasure be known."

In R. *v.* Pritchard (7 C. & P., p. 303), where a prisoner arraigned on an indictment for felony appeared to be deaf, dumb, and also of non-sane mind, Alderson, B., put three distinct issues to the

jury, directing the jury to be sworn separately on each: (1) Whether the prisoner was mute of malice or by the visitation of God; (2) Whether he was able to plead; (3) Whether he was sane or not. And on the last issue they were directed to inquire whether the prisoner was of sufficient intellect to comprehend the course of the proceedings of the trial, so as to make a proper defence, to challenge a juror to whom he might wish to object, and to understand the details of the evidence.

It should be noted that a prisoner found to be unfit to plead is liable to be tried should he subsequently recover from his mental illness. In a recent case—R. *v.* Cuff—at Bristol Winter Assize 1935 Mr. Justice Swift, in addressing the jury, said: "You have to find as a matter of fact whether or no she can plead. . . . She may recover and be fit to be tried."

Such a recovery and trial took place recently in the case of William Jones (*Times*, Nov. 15, 1933, and Feb. 15, 1934). The prisoner, an ex-Deputy Chief Constable of Glamorgan, was indicted on a number of charges of fraudulent conversion. It was alleged that he suffered from hallucinations, and was unable to appreciate time. Two doctors gave evidence, including the medical officer of H.M. Prison at Cardiff. The jury found that he he was "unfit to plead" and Mr. Justice MacKinnon ordered him to be detained until His Majesty's pleasure be known. He was admitted to Broadmoor Criminal Lunatic Asylum on Nov. 23, 1933.

He was subsequently charged before Mr. Justice Lawrence at Glamorgan Assizes on Feb. 14, 1934, and pleaded guilty to a number of charges of fraudulent conversion, and was sentenced to three years' penal servitude. During the course of the trial the medical superintendent at Broadmoor said that Jones was admitted to the institution on Nov. 23, 1933. He appeared to be suffering from loss of memory and referred to a man who was in his cell and trying to rob him. Within three days this delusion disappeared, and in a week his senses seemed to be quite rational and normal.

The Judge: "Have you formed any opinion as to whether the insanity was genuine?" It was not genuine. Mr. Trevor Morgan, who defended, said that in spite of the medical evidence there was little doubt that at one time Jones's mind had become unhinged.

We think this case is worthy of comment, and are of opinion that the prisoner was suffering from temporary insanity at the time when the jury found him "unfit to plead" in November, 1933.

The case illustrates two points which we have previously endeavoured to emphasize: (1) That stress of circumstances may initiate an attack of insane mental disorder; (2) That the duration of insanity may vary from some part of a day to a whole life-time. The prisoner had previously had an honourable and unblemished career, and the consequences of his lapse were quite sufficient to

cause insane mental disorder. Our view appears to be supported by the evidence given at Cardiff in November, 1933, and by the verdict of the jury at that time. It seems inconceivable that an experienced police officer in a normal state of mind could fail to realize the folly of feigning insanity, knowing well the result which would follow!

The Trial of Lunatics Act 1883 (46 & 47 Vict., c. 38)

This Act repeals section 1 of Criminal Lunatics Act 1800.

Section 2 (1) provides that: "where in any indictment on information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane so as not to be responsible according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried, that he did the act or made the omission charged, but was insane as aforesaid, at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission."

Section 2 (2) provides that: "where such special

verdict is found, the court shall order the accused to be kept in custody as a criminal lunatic, in such place and in such manner as the court shall direct, till his Majesty's pleasure shall be known; and it shall be lawful for his Majesty thereupon, and from time to time, to give such order for the safe custody of the said person during pleasure, in such place and in such manner as to his Majesty may seem fit."

There is no appeal against a special verdict.

Felstead *v.* Director of Public Prosecutions (10 Cr. App. R. (1914), 129).—During the hearing of this appeal the somewhat ambiguous expression "Guilty but insane" was discussed. Lord Reading, in delivering the finding of the House of Lords, referred to the special verdict, and said: "That is not a verdict that the accused was guilty of the offence charged, but that he was guilty of the act, charged as an offence."

Criminal Lunatics Act 1884 (47 & 48 Vict., c. 64)

Section 2 (4) provides that: "In the case of a prisoner under sentence of death, if it appears to a Secretary of State, either by means of a certificate signed by two members of the Visiting Committee of the prison in which prisoner is confined, or by any other means that there is reason to believe such prisoner to be insane, the Secretary of State shall appoint two or more legally qualified medical practitioners and the said medical practitioners

shall forthwith examine such prisoner and inquire as to his sanity, and after such examination and inquiry such practitioners shall make a report in writing to the Secretary of State as to the sanity of the prisoner, and they, or the majority of them, may certify in writing that he is insane."

Section 4 (1) enacts that: "the Secretary of State shall at least once in every three years during which a criminal lunatic is detained in any asylum or other place, take into consideration the condition, history, and circumstances of such lunatic and determine whether he ought to be discharged or otherwise dealt with."

Section 5 (2) enacts that: "A Secretary of State by warrant may absolutely discharge any criminal lunatic, and may also discharge any criminal lunatic conditionally, that is to say, on such conditions as to the duration of such discharge and otherwise as the Secretary of State may think fit."

There are two points which require notice in connection with the Criminal Lunatics Act 1884:—

1. It is left to the medical practitioners appointed by the Secretary of State to examine the prisoner as to his sanity. They are not bound by any rules as to what constitutes sanity or insanity, these matters being left, as we submit they should be, to their own judgment.

2. There is no statutory enactment which provides that a condemned person found to be insane shall be reprieved, but it is a well established rule

of common law that a reprieve shall follow a finding of insanity. (*See* Archbold, p. 226.)

It may be of interest to refer briefly to four cases in which prisoners under sentence of death were examined by medical experts at the instance of the Home Secretary under the powers conferred by the Criminal Lunatics Act 1884, sec. 2, par. 4.

Case 1.—Ronald True, who was found guilty of the murder of Gertrude Yates (Olive Young) and was sentenced to death by Mr. Justice McCardie at the Central Criminal Court on May 5, 1922. An appeal to the Court of Criminal Appeal was heard on May 27 and 28 and dismissed. The Home Secretary deputed Sir John Baker, Sir Maurice Craig, and Dr. Dyer to examine the prisoner, and they unanimously certified him to be insane. He was transferred to Broadmoor Criminal Lunatic Asylum. (*Times*, June 8, 1922.)

Case 2.—Charles James Cowle (18) was tried for the murder of Naomi Ann Farnworth (6) at Manchester Assizes on April 26, 1932. Dr. A. C. Sturrock, of Manchester, said that Cowle was a high-grade mental defective. His mentality was equal to that of a child of 10 years. Dr. McDonald, Assistant Medical Officer of Strangeways Prison, Manchester, said that he could detect no signs of mental disease in the prisoner. The jury returned a verdict of " wilful murder," and he was sentenced to death by Mr. Justice Humphreys. (*Times*,

April 27, 1932.) The execution was fixed for May 18. (*Times*, May 17, 1932.)

In view of certain statements appearing in the press regarding Charles James Cowle the Home Secretary caused a statutory inquiry to be made. The medical practitioners appointed to examine the prisoner did not consider him to be insane or mentally defective, or to be suffering from any lesser degree of mental abnormality such as would lead them to suppose he was not responsible for his crime. The Home Secretary decided not to interfere with the due course of the law. (*Times*, May 23, 1932.)

Case 3.—Ernest Brown was sentenced to death for the murder of his employer, Mr. F. E. Morton, on Sept. 6, 1933, and his execution was postponed that he might be examined by mental experts (*Times*, Feb. 5, 1934). These experts certified him to be sane, and he was executed at Armley Gaol, Leeds, on Feb. 6, 1934.

Case 4.—James Robert Vent (*Times*, March 14, 1935), who at the Central Criminal Court on Feb. 14, 1935, pleaded " Guilty " to a charge of murder and was sentenced to death. He subsequently appealed, and the Court of Criminal Appeal dismissed his appeal. The medical practitioners appointed to hold the inquiry certified that Vent was insane, and the death sentence was respited with a view to Vent's removal to Broadmoor Criminal Lunatic Asylum.

Criminal Appeal Act 1907 (7 Edw. 7, c. 3)

Section 5 (4) provides that: "If on any appeal it appears to the Court of Criminal Appeal that although the defendant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made, so as not to be responsible according to law for his actions, the Court may quash the sentence passed at the trial, and order the appellant to be kept in custody as a criminal lunatic under the Trial of Lunatics Act 1883 in the same manner as if a special verdict had been found by the jury under that Act." (*See* case of Tom Gilbert, 1914 (11 Cr. App. R.), and *above.*

ABBREVIATIONS

A.C.—*Law Reports, Appeal Cases, House of Lords and Privy Council.*

Archbold.—*Archbold's Pleading, Evidence, and Practice in Criminal Cases,* 29th Ed.

Burr.—*Burrow's Reports, King's Bench.*

B.M.J.—*British Medical Journal.*

C. & K.—*Carrington & Kirwan's Reports, Nisi Prius.*

C. & M.—*Carrington & Marshman's Reports, Nisi Prius.*

Cl. & F.—*Clark & Finelly's Reports, House of Lords.*

C. & P.—*Carrington & Payne's Reports, Nisi Prius.*

Collinson.—*The Law Concerning Lunatics, etc., G. Dale Collinson,* 1812.

Cox.—*Cox's Criminal Cases.*

Cr. App. R.—*Criminal Appeal Reports.*

D. & E.—*Durnford & East's Term Reports, K.B.*

E.R.—*English Reports.*

F. & F.—*Foster & Finlason's Nisi Prius Reports.*

J.P.—*Justice of the Peace Reports.*

K.B.—*Law Reports, King's Bench.*

K.S.C.—*Kenny's Selection of Cases in Criminal Law,* 6th ed. (Cambridge University Press).

L.J.K.B.—*Law Journal, King's Bench.*

L.J.M.C.—*Law Journal Reports, Magistrates' Cases.*

L.R.—*Law Reports.*

L.T.—*Law Times Reports.*

Lewin.—*Lewin's Reports of Crown Cases.*

Moo. P.C.—*Moore's Privy Council Cases.*

Q.B.D.—*Law Reports, Queen's Bench Division.*

R. & R.—*Russell & Ryan's Crown Cases Reserved.*

Russ.—*Russell on Crimes and Misdemeanours,* 7th ed., 1909.

St. Tr.—*Howell's State Trials* (1680–1820).

T.L.R.—*Times Law Reports.*

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PAGE

ALEXANDER, THOMAS, R. *v.*
Cr. App. R., vol. ix (1913), p. 139; 23 Cox., p. 604; 109, L.T., p. 745 140

ANDERSON, PERCY CHARLES, R. *v.*
Times, March 9, 1935; *Ibid.*, March 30; *Ibid.*, April 17 .. .. .. 98, 100, 101, 120

ARNOLD, R. *v.*
16, St. Tr., p. 695 (1724) 82

BAINES, R. *v.*
Times Jan. 25, 1886; Russ., p. 88 .. .. 33, 63

BARRETT'S CASE.
Times, April 28, 1868 51

BEARD, D. OF P.P. *v.*
Cr. App. R., vol. xiv, H.L., 1920, p. 159; 36, T.L.R., p. 379; 84, J.P., p. 129; Archbold, p. 894, K.S.C., p. 54 33, 45, 50, 54, 55, 63, 64, 65

BELL, THE STATE *v.*
K.S.C., p. 55 (1870) 45

BELLINGHAM, R. *v.*
1, Collinson, p. 636, 1812 .. .. .. 82, 96

BROWN, ERNEST, R. *v.*
Times, Feb. 5, 1934 152

BURROWS, R. *v.*
1, Lewin, pp. 75, 76, 1823 .. .. .. 32, 57

BURTON, R. *v.*
3. F. & F., p. 772 (1863); Archbold, p. 17; K.S.C., p. 50 .. .. 62, 77

CHISHOLM *v.* DOULTON.
22, Q.B.D., p. 736, 1889; 16, Cox, p. 375; 60, L.T., p. 966; Archbold, p. 21 38

CLAYTON, R. *v.*
Cr. App. R., vol. xv, 1920, p. 45 48

CODERE, GEORGES, R. *v.*
Cr. App. R., vol. xii, 1916, p. 21; Archbold, p. 16 .. .. 96, 97

COLLINS, MICHAEL, R. *v.*
Cr. App. R., vol. vi, 1911, p. 193 .. .. 36, 92

PAGE

COWLE, C. J., R. *v.*
Times, April 27, 1932; *Ibid.*, May 17; *Ibid.*, May 23 151
CRUSE, R. *v.*
8, C. & P., 1838, p. 541 .. .. ..50, 61
CUFF, R. *v.*
Bristol Winter Assize, 1935 146

DAVIES, WILLIAM, R., *v.*
Cr. App., R., vol. viii (1913), p. 211; 29, T.L.R., p. 350 .. ..49, 54
DAVIS, R. *v.*
14, Cox, p. 563 (1881); Archbold, p. 18 ..33, 62
DOHERTY, R. *v.*
16, Cox, 1887, p. 306 63
DOVE, R. *v.*
Times, July 21, 1856 97

FARRINGTON, R. *v.*
R. & R., p. 207 (1811); Archbold, p. 352 46, 128
FELSTEAD, D. OF, P.P. *v.*
Cr. App. R., vol. x (1914), p. 129; 30, T.L.R., p. 469; A.C., p. 534; Archbold, p. 215 .. 149
FERRERS, EARL, R. *v.*
19, St. Tr., p. 885 (1760) 82
FLAVELL, JOSEPH EDWARD, R. *v.*
Cr. App. R., vol. xix, p. 141 (1926) 79
FOWLER *v.* PAGET.
7, D. & E. (1798) 37

GILBERT, TOM, R. *v.*
Cr. App. R., vol. xi (1914), p. 23; 112, L.T., p. 479; Archbold, p. 323 .. .. 105, 112
GRINDLEY, R. *v.*
(1819) Russ., p. 88 61

HADFIELD, R. *v.*
27, St. Tr. (1800), p. 1281 91
HARDING, R. *v.*
Cr. App. R., vol. i (1908), p. 219; 25, T.L.R., p. 139 33
HAYNES, R. *v.*
1, F. & F. (1859), p. 666; K.S.C., p. 52; Archbold, p. 17 77
HOLT, F. R., R. *v.*
Cr. App. R., vol. xv (1920), p. 10; Archbold, p. 17 113
HONEYANDS, R. *v.*
Cr. App. R., vol. x (1914), p. 16 119

PAGE

IRELAND, ALBERT WILLIAM, R. *v.*
Cr. App. R., vol. iv (1910), p. 87 120

JEFFERSON, R. *v.*
Cr. App. R., vol. i (1908), p. 95; 24, T.L.R., p. 877; 72, J.P. (1908), p. 467 91
JONES, WILLIAM, R. *v.*
Times, Nov. 15, 1933; *Ibid.*, Feb. 15, 1934 .. 146

KOPSCH, ALFRED ARTHUR, R. *v.*
Cr. App. R., vol. xix (1925), p. 50; Archbold, p. 17 80

LAW, R. *v.*
2, F. & F., p. 836 (1862) 3, 110
LAYTON, R. *v.*
4, Cox, p. 149 (1849) 110, 118
LUMLEY, R. *v.*
22, Cox, p. 635 (1912); 76, J.P., p. 208; Archbold, p. 895 53

MACDONALD, JAMES, R. *v.*
Cr. App. R., vol. i, p. 266 (1908) .. 13, 111
MARSLAND, R. *v.*
Cr. App. R., vol. vii, p. 77 (1911) 112
MCNAGHTEN'S CASE.
10, Cl. & F. (1843), p. 200; 4, St. Tr. (N.S.), p. 847; Archbold, p. 14; K.S.C., p. 43 83, 107
MEADE, R. *v.*
Cr. App. R., vol. ii, p. 54 (1909); 78, L.J.K.B., p. 476; 1, K.B., p. 895 .. 50, 54, 56, 63, 65, 107
MILLER, R. *v.*
14, Cox, p. 356; Archbold, p. 915 129
MONKHOUSE, R. *v.*
14, Cox, p. 55 (1849); 14, J.P., p. 115 45, 50, 61

NATTRAS, R. *v.*
15, Cox, p. 73 (1882); K.S.C., p. 156; Archbold, p. 753 42

O'DONOGHUE, R. *v.*
Cr. App. R., vol. xx, p. 132 (1927); 44, T.L.R., p. 51 (1927); Archbold, p. 930 141
OFFORD, R. *v.*
5, C. & P., p. 168 (1831) 97
OWEN, R. *v.*
4, C. & P., p. 236 (1830); Archbold, p. 12; K.S.C., p. 42 .. .. 48, 134

PAGE

OXFORD, R. *v.*
9, C. & P., p. 525 (1840); 4, St. Tr. (N.S.), p. 497; Archbold, p. 13 .. .. 77, 83, 89, 107

PANK, R. *v.*
Times, May 22, 1919, and Ref. 29 .. .. 95, 98
PERRY, HENRY, R. *v.*
Cr. App. R., vol. xiv, p. 48 (1919) 35, 92
PORTER, R. *v.*
Bristol Winter Assize, 1931 46
PRINCE, R. *v.*
L.R., 2, C.C.R., p. 154 (1875); 44, L.J.M.C., p. 122; K.S.C., p. 21 .. .. .. 37, 38, 39
PRITCHARD, R. *v.*
7, C. & P., p. 303 (1836); Archbold, p. 161 .. 145
PHILPOT, R. *v.*
Cr. App. R., vol. vii, p. 140 (1912) 46

REED, R. *v.*
C. & M., p. 306 (1842); K.S.C., p. 287 .. 48
RENNIE, R. *v.*
1, Lewin, pp. 75, 76 (1825) 32, 57

SERNÉ, R. *v.*
16, Cox, p. 311 (1887); K.S.C., p. 106; Archbold, p. 895 52
SIMMONITE, R. *v.*
Cr. App. R., vol. xii, p. 142 (1916); 2, K.B., p. 821; Archbold, p. 212 132
SMITH, JOHN WILLIAM, R. *v.*
Cr. App. R., vol. v, p. 77 (1910) .. 14, 92, 111
SMITH, OLIVER, R. *v.*
Cr. App. R., vol. vi, p. 19 (1910) .. 90, 117
STADTMULLER'S CASE.
Liverpool Winter Assize, 1858 52
STOKES, R. *v.*
3, C. & K., p. 185 (1848); Archbold, p. 13 .. 91
STOPFORD, R. *v.*
11, Cox, p. 643 (1870) 50, 62

TAYLOR, R. *v.*
L.R., 1, C.C.R., p. 194 (1869); 38, L.J.M.C., p. 106; Archbold, p. 209 .. .. .. 44, 123, 130
TOLSON, R. *v.*
23, Q.B.D., p. 168 (1889); 58, L.J.M.C., p. 97; K.S.C., p. 15; Archbold, p. 406 .. .. 37, 48

PAGE

TRUE, RONALD, R. *v.*
Times, May 6, 1922; Cr. App. R., vol. xvi, p. 164 (1922); 27, Cox, p. 287; 127, L.T., p. 567 79, 151

VENT, JAMES ROBERT, R. *v.*
Times, March 14, 1935 152

WARING *v.* WARING.
6, Moo. P.C. (1848), p. 341; 13, E.R., p. 715, P.C. 104
WHITMARSH, R. *v.*
62, J.P., p. 711 (1898); Archbold, p. 8954 .. 53
WOODFALL, R. *v.*
5, Burr., p. 2661 (1770); 98, E.R., p. 398 .. 51
WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS.
Times, May 24, 1935 49

INDEX

PAGE

ABORTION, criminal - - - - 52, 53
— — McCardie, J., on - - - - 53
Access to evidence of insanity possessed by Crown - - 117
Accident - - - - - - 49, 54
— and prosecution - - - - - 49
Acts, nature and quality of - - - - 94, 95, 96
"Actual insanity" - - - - - 63, 64
"Actus non reum facit, nisi mens sit rea" - - 37, 38
Acute drunkenness and insanity - - - 59, 65
— infections and insanity - - - - 21, 34, 67
Adolescence and insanity - - - - 18
Adsorption of toxic substances by brain-cells - - 68
Advocacy in cases involving mental disability - 115–125
Alcohol in blood - - - - - 72
— and nervous system - - - - 68, 69, 71
— in urine - - - - - 72, 74
Alcoholic insanity, acute and chronic - - 68
Alternative verdicts - - - - - 44, 123
Arterial spasm and mental confusion - - 27
Arteriosclerosis - - - - - 25
— and mental confusion - - - - 26
Arteritis obliterans - - - - - 27
Assaults - - - - - - 43
— possible reasons for - - - - 44
— and reflective thought - - - - 44
"At the time" - - - - 35, 87, 91, 92

BIGAMY and mens rea - - - - 39
Blood, examination of, in drunkenness, etc. - 30, 72
Blood-pressure, normal - - - - - 24
— and age - - - - - - 24
— assaults - - - - - - 43
— hard work - - - - - - 26
— mental states - - - - 23, 43, 119, 120
Brain cells and mental disorder - - - - 11
— — toxic substances - - - - 68
— disease of - - - - - 3, 11, 110
— injury to, and insanity - - - - 22
— and mind, relationship between - 5, 6, 10, 11, 12, 68
— morbid action of - - - - - 3, 110

CABANIS, views on brain and thought - - - 8
Causes of insanity - - - - - 17–27
Cerebral arteries, spasm of - - - - 27
Chemical examination of blood and urine - - 72, 74

PAGE
Child, newly born - - - - - - 141
Children and criminal offences - - 48, 134, 142–145
Chronic alcoholism and insanity - - - - 68
Climacteric period and insanity - - - 18–20
Coke's definition of murder - - - - - 93
Conditions not generally recognized as insanity - 119, 120
Conduct and mental disease - - - 15, 16, 29
Consequences of unlawful acts, presumption of knowledge of 46
Constructive intent - - - - - 50–56
— — and accidents - - - - - 54
— murder - - - - - 39, 56
Court of Criminal Appeal and irresistible impulse - 79, 80, 81
— — — McNaghten Rule - - - - 111–113
Criminal abortion - - - - - 52, 53
— asylums, release from - - - - - 120
— mens rea - - - - - 38, 39, 40
Crown, evidence of insanity possessed by - - - 117

Darling, J., and "dementia affectata" - - - 65
Day, J., on temporary insanity - - - - 33
Death sentence, insanity after - - - - 149
Defect of reason - - - - - 93, 94
Defending counsel and evidence of insanity possessed by Crown - - - - - - 117
Delirium, a temporary insanity - - - 34, 94
Delusions and indivisibility of mind - - 102, 104, 105
— insanity - - - - 28, 101–103, 112–118
— McNaghten Rule - - - - - 88, 89
Dementia affectata - - - - - - 65
Diagnosis of drunkenness - - - - 70–75
— insanity - - - - - - 16, 28–32
Disease of the brain - - - - - 11, 110
— meaning of word - - - - - - 4
— of mind - - - - - - 13–36, 87
— — due to drunkenness - - - - 57, 58, 59
Dissolution, law of - - - - - 29, 69
Drunkenness - - - - - - 57–75
— acute and chronic - - - - - - 68
— an acute form of insanity - - - 34, 69
— as a defence - - - - - 45, 61–65
— diagnosis of - - - - - 70–75
— due to fraud - - - - - - 58
— empirical tests for - - - - 71, 72
— and insanity due to drunkenness - - 57, 64
— intent - - - - - - - 45
— murder - - - - - - - 65
— pathological and physiological - - - - 60
— and pupil reactions - - - - 31, 74, 75
— rebutting effect of - - - - 45, 61–65
— and Road Traffic Act - - - - - 70
— a toxæmia - - - - - - - 71

PAGE
Drunkenness and urine examination - - 30, 74
— views on, of, Day, Mr. Justice - - - - 63
— — Lord Haldane - - - - - - 66
— — Sir J. Purves-Stewart - - - - - 73
Duration of insanity - - - - - - 33

Elderly men and indecency - - - - 19, 125
Emergence of mind - - - - - 9, 41
Endocrine glands and insanity - - - - 21
Epidemic encephalitis and insanity - - - - 67
Epilepsy and crime - - - - - - 35
Epiphenomenalism - - - - - - 8
— Huxley's views on - - - - - 8
Eye, examination of, with ophthalmoscope - - - 32

Faculties of mind - - - - - - 14
Fallacy of partitioned mind - - - 12, 101–105, 113
Felonies and constructive intention - - - 51, 52, 56
Foreknowledge and intent distinguished - - - 40

Gerocomic tendencies - - - - - 19
Giddiness, a sane disorder of mind - - - - 14
Glaister on pupil reactions in drunkenness - - - 74
"Guilty but insane," meaning of verdict of - - - 149

Haldane, Lord, on mind - - - - - 6
— — drunkenness - - - - - 66
Hallucinations and insanity - - - - - 28
Head, abnormal sensations in at menopause - - - 20
— injuries and insanity - - - - 22, 23
Heart failure and mental symptoms - - - - 21
Hepatic lesions and mental symptoms - - - 22
Heredity and insanity - - - - - 17
Hewart, Lord, and McNaghten Rule - - 98, 114
— — "special verdict" - - - - - 120
Huxley and epiphenomenalism - - - - 8

Incapacity to form intention - - 34, 43–45. 61–63
Incarceration for life and Criminal Lunatics Act 1884, s.s. 4 and 5 - - - - - - - 120
Incest and indecent assault - - - - - 132
Indecency and elderly men - - - - 19, 125
Indivisibility of mind - - - 12, 101–105, 113
Inebriation (*see* Drunkenness)
Infections, acute, and insanity - - - 21, 67
Insane prisoners and Secretary of State - - 149, 150
Insanity - - - - - - - 13–36
— after death sentence - - - - 149, 150
— alcoholic, acute and chronic - - - - 68
— associated with acute diseases - - - 21, 67
— causes of - - - - - - 17–27

PAGE
Insanity, conditions not generally recognized as - 119, 120
— and delusions - - - 28, 101–103, 112–118
— diagnosis of - - - - - 16, 28–32
— and drunkenness (*see* Drunkenness)
— due to drunkenness - - - 57, 59, 62, 63, 64
— — syphilis - - - - - - 21
— duration of - - - - 33, 59, 67, 92
— evidence of, possessed by Crown - - - - 117
— and hallucinations - - - - - 28
— head injuries - - - - - 22–23
— in the legal sense - - - - 13, 14, 83–105
— "legal definition of" - - - - - 14
— and McNaghten Rule - - - - 83–105
— medical evidence regarding - - - - 117
— nature of - - - - - - 16
— onus of proof of, rests on defence - - 50, 89
— and parturition - - - - - 20
— physical stigmata - - - - - 29
— presumption of intention - - - - 47
— of short duration - - - 21, 32–36, 67, 92, 119
— and stress of circumstances - - - - 22
Intent - - - - - - -40–50
— constructive - - - - - 50–56
— and drunkenness - - - - - 45, 61–65
— foreknowledge distinguished - - - 40, 41
— full intention - - - - - - 42
— Lloyd Morgan on - - - - - - 42
— presumption of - - - - - - 46
— proof and rebuttal of - - - - 46–50
— and reflective thought - - - - - 42
— specific - - - - - - - 44
Interactionists and mind - - - - 10, 12
Investigation of mental states - - - - 28–32
Irresistible impulse - - - - 76–81
— — "fantastic theory" of - - - - 81
— — McCardie, J., on - - - - - 79
— — and McNaghten Rule - - - - 79, 80, 113
— — medical and legal views regarding - - 77, 78

JUDGES and particular defences - - - - 119
Juries and the McNaghten Rule - - 109, 111, 113, 118
— medical witnesses - - - - - - 118

KNEE-JERK - - - - - - - - 32
Knowledge of consequences of acts presumed - - 46
— right and wrong - - - - - 82, 83, 87

LAW of dissolution - - - - - 29, 69
"Legal definition of insanity" - - - - - 14
Lloyd Morgan on intent - - - - - 42
— — mind - - - - - - - 6, 9
— — reflective thought - - - - - 41

PAGE

McCardie, J., on criminal abortion - - - - 53
— — irresistible impulse - - - - - 79
McDougall on mind - - - - - - 6
McNaghten Rule - - - - - 83–105
— — capable of wide interpretation - - - 109
— — and Court of Criminal Appeal - - - 111
— — delirium tremens - - - - 62, 63
— — delusions - - - - - 88–89
— — irresistible impulse - - - - 79, 80, 113
— — juries - - - - - 109, 111, 113, 118
— — Lord Hewart on - - - - 98, 114
— — and mental confusion - - - - - 34
— — a rule of common law - - - - 108
Mania à potu - - - - - - 60
Medical witnesses and insanity - - - 85, 89
— — juries - - - - - - 118
Medium of composition of effects - - - - 9
Menopause and insanity - - - - - 19
Mens rea - - - - - - 37–40
— — absence of, in delirium - - - - 34
— — criminal, degrees of - - - 39, 40
— — defined - - - - - 38
— — varieties of - - - - - 38
Mental confusion and acute infections - - - 34
— — arteriosclerosis - - - - - 27
— — blood-pressure - - - 26, 27, 119, 120
— — degrees of - - - - - 122
— — and McNaghten Rule - - - - 34
— deficiency - - - - - 137–140
— — Acts - - - - - 137, 138
— — and age limits - - - - 139, 140
— — "special verdict" - - - - 140
— disease and brain-cell degeneration - - - 11
— — conduct - - - - 15, 16, 29
— states, investigation of - - - - 28–32
— — statutory enactments relating to - - 126–153
— Treatment Act, 1930, s.s. 1–4 - - - - 14
Mercier and faculties of mind - - - - 14
— duration of insanity - - - - - 59
Mind - - - - - - - 4–12
— Aristotle on - - - - - - 5, 7
— and brain, relationship between - 5, 6, 10, 11, 12, 68
— disease of - - - - - 13–36, 87
— emergence of - - - - - - 9
— an epiphenomenon - - - - - 8
— faculties of - - - - - - 14
— indivisibility of - - - - 12, 101–105, 113
— and interactionists - - - - 10, 12
— Lloyd Morgan on - - - - - 6, 9
— Lord Haldane on - - - - - 6
— McDougall on - - - - - - 6
— origin of - - - - - - 8–10

PAGE
Morbid action of brain - - - - 3, 110
Murder, Coke's definition of - - - - - 93
— and drunkenness - - - - - - 65
— mens rea - - - - - - - 39
Myxœdema and insanity - - - - - 21

Nature and quality of acts - - - 94, 95, 96
Nervous system, examination of, in suspected drunkenness 71–75
— — — — insanity - - - - 30–32

Onus of proof of insanity rests on prisoner - 50, 89
Ophthalmoscope and disease of brain - - - 32

Parturition and insanity - - - - - 20
Pervading principle (Lotze) - - - - - 9
Physical stigmata and insanity - - - - 29
Physiological strain and insanity - - - - 17
Plead, unfit to - - - - - 145–148
Presumption of intention rebutted - - - 47, 50
— — regarding consequences of acts - - 46, 47
— law regarding children - - - 48, 134, 143, 144
— sanity - - - - - - - 89
Proof of intention - - - - - - 46
Psychology of intent - - - - - - 42
Psychophysical-parallelism - - - - - 10
Pupil reflexes and drunkenness - - - 31, 74, 75
— — syphilis - - - - - - - 31
Purves-Stewart, Sir James, and drunkenness - - 73

Reason, defect of - - - - - 87, 93
Reasonable creature - - - - - - 93
Rebuttal of presumption of intention - - 47–50
Rebutting effect of intoxication - - - 45, 65
Recovery after verdict of "unfit to plead" - - - 146
Reflective thought and assaults - - - - 44
— — intent - - - - - - - 42
Reflexes, nervous - - - - - - 31
Right and wrong, knowledge of - - - 82, 83, 87
Road Traffic Act 1930, s. 15, "under influence of drink" - 70

Sane or insane? - - - - - - - 16
Sanity, presumption of - - - - - 89
Secretary of State and insane prisoners - - 149, 150
Significance of McNaghten Rule - - - 106–114
Spasm of arteries of brain - - - - - 27
"Specific intention" - - - - 42, 44, 45
Stammering and drunkenness - - - - 72
Statutory enactments regarding mental states - 126–153
Stewart, Sir James Purves-, and drunkenness - - - 73
Stigmata of insanity - - - - - - 29
Stress of circumstances and insanity - - - - 22

PAGE

Syphilis and insanity - - - - - - 21
— pupil reflexes - - - - - - 32
— tendon reflexes - - - - - - 31

Temporary insanity - - - 21, 32–36, 67, 92, 119
Tendon reflexes - - - - - - 32
Time, at the - - - - - 35, 87, 91, 92
Toxic insanity - - - - - - 20
Trauma and insanity - - - - - 22, 23

Uncontrollable impulse (*see* Irresistible Impulse)
Unfit to plead, verdict of - - - - - 145
— — — and subsequent trial - - - - 146
Urine, examination of in drunkenness, etc. - - 30, 72, 74

Verdict of "guilty but insane" - - 120, 140, 149
— "unfit to plead" - - - - - 145–148
Verdicts, alternative - - - - - 44, 123

Warnock, Dr., on indivisibility of mind - - - 102
Wrong, knowledge that it was - - - 82, 83, 87
— meaning of word - - - - - 96–98